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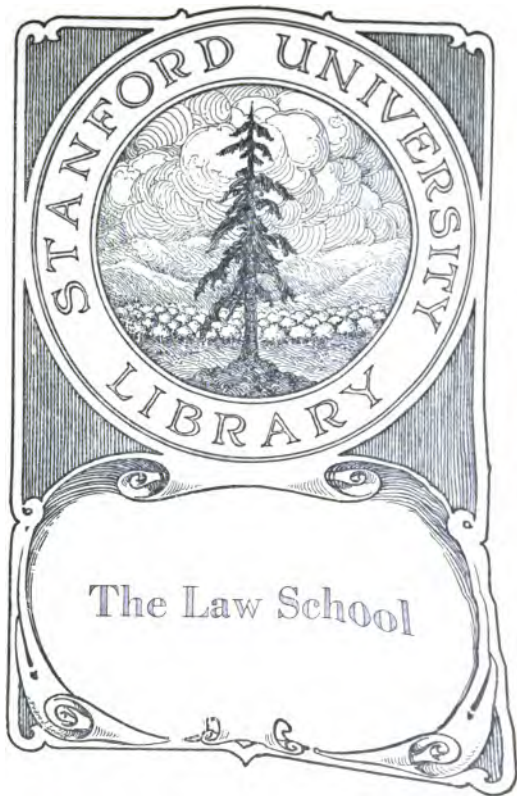
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THE CODE
OF
CIVIL PROCEDURE.

[3]



THE
CODE
OF
CIVIL PROCEDURE
OF THE
STATE OF CALIFORNIA,

ADOPTED MARCH 11TH, 1872, AND AMENDED IN 1881.

WITH
NOTES AND REFERENCES TO THE DECISIONS
OF THE SUPREME COURT.

BY
NATHAN NEWMARK,
OF THE SAN FRANCISCO BAR.

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1882.

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[6]

P R E F A C E .

THE present edition of the Code of Civil Procedure is designed to present the complete text of the Code as now in force, together with convenient references to the entire body of the decisions thereunder. The Code is thus adapted to the extensive changes wrought by the amendments of 1880, made in conformity with the new Constitution of the State. The method of annotation adopted is characterized by the use of index or catch-words appropriate to a compact manual like this. Condensation is further facilitated by the employment of gradations of type. The citation of cases is confined to those in the California Reports, which are referred to by page and volume only. It is hoped that manifestations of careful and faithful effort will not seem lacking, and that the practitioner will be enabled to discover at a glance the object of his search.

NATHAN NEWMARK.

SAN FRANCISCO, October, 1880.

[As amended in 1881.]

[7]



CODE OF CIVIL PROCEDURE.

IN FOUR PARTS.

- PRELIMINARY PROVISIONS. §§ 2-32.**
- PART I. OF COURTS OF JUSTICE. § 33-304.**
- PART II. OF CIVIL ACTIONS. §§ 307-1059.**
- PART III. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE. §§ 1063-1822.**
- PART IV. OF EVIDENCE. §§ 1823-2104.**
- INSOLVENT ACT. pp. 645-669.**

Practice Act.	Code C. P.	Practice Act.	Code C. P.
§ 50.....	§ 453	§ 88.....	§ 494
§ 51.....	§ 446	§ 89.....	§ 495
§ 52.....	§ 446	§ 90.....	§ 496
§ 53.....	§ 447	§ 91.....	§ 497
§ 54.....	§ 448-449	§ 92.....	§ 498
§ 55.....	§ 446	§ 93.....	§ 499
§ 56.....	§ 454	§ 94.....	§ 500
§ 57.....	§ 453	§ 95.....	§ 501
§ 58.....	§ 455	§ 96.....	§ 502
§ 59.....	§ 456	§ 97.....	§ 503
§ 60.....	§ 457	§ 98.....	§ 504
§ 61.....	§ 459	§ 99.....	§ 509
§ 62.....	§ 460	§ 100.....	§ 510
§ 63.....	§ 461	§ 101.....	§ 511
§ 64.....	§ 497	§ 102.....	§ 512
§ 65.....	§ 463	§ 103.....	§ 513
§ 66.....	§ 463	§ 104.....	§ 514
§ 67.....	§ 464-473	§ 105.....	§ 515
§ 68.....	§ 473	§ 106.....	§ 516
§ 69.....	§ 474	§ 107.....	§ 517
§ 70.....	§ 459	§ 108.....	§ 518
§ 71.....	§ 475	§ 109.....	§ 519
§ 72.....	§ 478	§ 110.....	§ 520
§ 73.....	§ 479	§ 111.....	§ 525
§ 74.....	§ 480	§ 112.....	§ 526
§ 75.....	§ 481	§ 113.....	§ 527
§ 76.....	§ 482	§ 114.....	§ 528
§ 77.....	§ 483	§ 115.....	§ 529
§ 78.....	§ 484	§ 116.....	§ 530
§ 79.....	§ 485	§ 117.....	§ 531
§ 80.....	§ 486	§ 118.....	§ 532
§ 81.....	§ 487	§ 119.....	§ 533
§ 82.....	§ 488	§ 120.....	§ 537
§ 83.....	§ 489	§ 121.....	§ 538
§ 84.....	§ 490	§ 122.....	§ 539
§ 85.....	§ 491	§ 123.....	§ 540
§ 86.....	§ 492	§ 124.....	§ 541
§ 87.....	§ 493	§ 125.....	§ 542

Practice Act.	Code O. P.	Practice Act
§ 126...?	\$ 543	§ 164...
§ 127.....	\$ 544	§ 165...
§ 128.....	\$ 545	§ 166...
§ 129.....	\$ 546	§ 167...
§ 130.....	\$ 547	§ 168...
§ 131.....	\$ 549	§ 169...
§ 132.....	\$ 550	§ 170...
§ 133.....	\$ 551	§ 171...
§ 134.....	\$ 552	§ 172...
§ 135.....	\$ 553	§ 173...
§ 136.....	\$ 554	§ 174...
§ 137.....	\$ 555	§ 175...
§ 138.....	\$ 556	§ 176...
§ 139.....	\$ 557	§ 177...
§ 140.....	\$ 558	§ 178...
§ 141.....	\$ 559	§ 179...
§ 142.....	\$ 572	§ 180...
§ 143.....	\$ 564 569	§ 181...
§ 144.....	\$ 577	§ 182...
§ 145.....	\$ 578	§ 183...
§ 146.....	\$ 579	§ 184...
§ 147.....	\$ 580	§ 185...
§ 148.....	\$ 581	§ 186...
§ 149.....	\$ 582	§ 187...
§ 150.....	\$ 585	§ 188...
§ 151.....	\$ 588	§ 189...
§ 152.....	\$ 589	§ 190...
§ 153.....	\$ 590	§ 191...
§ 154.....	\$ 591	§ 192...
§ 155.....	\$ 592	§ 193...
§ 156.....	\$ 593	§ 194...
§ 157.....	\$ 594	§ 195...
§ 158.....	\$ 595	§ 196...
§ 159.....	\$ 600	§ 197...
§ 160.....	\$ 604	§ 198...
§ 161.....	\$ 601	§ 199...
§ 162.....	\$ 602	§ 200...
§ 163.....	\$ 603	§ 201...

CORRESPONDING SECTIONS—PRACTICE ACT AND CODE.

14

Practice Act.	Code C. P.	Practice Act.	Code C. P.
§ 50.....	§ 453	§ 88.....	§ 494
§ 51.....	§ 446	§ 89.....	§ 495
§ 52.....	§ 446	§ 90.....	§ 496
§ 53.....	§ 447	§ 91.....	§ 497
§ 54.....	§ 448-449	§ 92.....	§ 498
§ 55.....	§ 446	§ 93.....	§ 499
§ 56.....	§ 454	§ 94.....	§ 500
§ 57.....	§ 453	§ 95.....	§ 501
§ 58.....	§ 455	§ 96.....	§ 502
§ 59.....	§ 456	§ 97.....	§ 503
§ 60.....	§ 457	§ 98.....	§ 504
§ 61.....	§ 459	§ 99.....	§ 509
§ 62.....	§ 460	§ 100.....	§ 510
§ 63.....	§ 461	§ 101.....	§ 511
§ 64.....	§ 497	§ 102.....	§ 512
§ 65.....	§ 462	§ 103.....	§ 513
§ 66.....	§ 463	§ 104.....	§ 514
§ 67.....	§ 404-473	§ 105.....	§ 515
§ 68.....	§ 473	§ 106.....	§ 516
§ 69.....	§ 474	§ 107.....	§ 517
§ 70.....	§ 452	§ 108.....	§ 518
§ 71.....	§ 475	§ 109.....	§ 519
§ 72.....	§ 478	§ 110.....	§ 520
§ 73.....	§ 479	§ 111.....	§ 525
§ 74.....	§ 480	§ 112.....	§ 526
§ 75.....	§ 481	§ 113.....	§ 527
§ 76.....	§ 482	§ 114.....	§ 528
§ 77.....	§ 483	§ 115.....	§ 529
§ 78.....	§ 484	§ 116.....	§ 530
§ 79.....	§ 485	§ 117.....	§ 531
§ 80.....	§ 486	§ 118.....	§ 532
§ 81.....	§ 487	§ 119.....	§ 533
§ 82.....	§ 488	§ 120.....	§ 537
§ 83.....	§ 489	§ 121.....	§ 538
§ 84.....	§ 490	§ 122.....	§ 539
§ 85.....	§ 491	§ 123.....	§ 540
§ 86.....	§ 492	§ 124.....	§ 541
§ 87.....	§ 493	§ 125.....	§ 542

Practice Act.	Code O. P.	Practice Act.
§ 126.....	\$ 548	§ 164.....
§ 127.....	\$ 544	§ 165.....
§ 128.....	\$ 545	§ 166.....
§ 129.....	\$ 546	§ 167.....
§ 130.....	\$ 547	§ 168.....
§ 131.....	\$ 549	§ 169.....
§ 132.....	\$ 550	§ 170.....
§ 133.....	\$ 551	§ 171.....
§ 134.....	\$ 552	§ 172.....
§ 135.....	\$ 553	§ 173.....
§ 136.....	\$ 554	§ 174.....
§ 137.....	\$ 555	§ 175.....
§ 138.....	\$ 556	§ 176.....
§ 139.....	\$ 557	§ 177.....
§ 140.....	\$ 558	§ 178.....
§ 141.....	\$ 559	§ 179.....
§ 142.....	\$ 572	§ 180.....
§ 143.....	\$ 564-569	§ 181.....
§ 144.....	\$ 577	§ 182.....
§ 145.....	\$ 578	§ 183.....
§ 146.....	\$ 579	§ 184.....
§ 147.....	\$ 580	§ 185.....
§ 148.....	\$ 581	§ 186.....
§ 149.....	\$ 582	§ 187.....
§ 150.....	\$ 585	§ 188.....
§ 151.....	\$ 588	§ 189.....
§ 152.....	\$ 589	§ 190.....
§ 153.....	\$ 590	§ 191.....
§ 154.....	\$ 591	§ 192.....
§ 155.....	\$ 592	§ 193.....
§ 156.....	\$ 598	§ 194.....
§ 157.....	\$ 594	§ 195.....
§ 158.....	\$ 593	§ 196.....
§ 159.....	\$ 600	§ 197.....
§ 160.....	\$ 604	§ 198.....
§ 161.....	\$ 601	§ 199.....
§ 162.....	\$ 602	§ 200.....
§ 163.....	\$ 608	§ 201.....

Practice Act.	Code C. P.	Practice Act.	Code C. P.
§ 202.....	§ 669	§ 240.....	§ 716
§ 203.....	§ 670	§ 241.....	§ 717
§ 204.....	§ 671	§ 242.....	§ 718
§ 205.....	§ 672	§ 243.....	§ 719
§ 206.....	§ 673	§ 244.....	§ 720
§ 207.....	§ 674	§ 245.....	§ 721
§ 208.....	§ 675	§ 246.....	§ 722
§ 209.....	§ 681	§ 247.....	§ 727
§ 210.....	§ 682	§ 248.....	§ 728
§ 211.....	Canceled	§ 249.....	§ 731
§ 212.....	§ 683	§ 250.....	§ 732
§ 213.....	§ 684	§ 251.....	§ 733
§ 214.....	§ 685	§ 252.....	§ 734
§ 215.....	§ 686	§ 253.....	§ 735
§ 216.....	§ 687	§ 254.....	§ 738
§ 217.....	§ 688	§ 255.....	§ 739
§ 218.....	§ 689	§ 256.....	§ 740
§ 219.....	§ 690	§ 257.....	§ 741
§ 220.....	§ 691	§ 258.....	§ 742
§ 221.....	§ 692	§ 259.....	§ 743
§ 222.....	§ 693	§ 260.....	§ 744
§ 223.....	§ 694	§ 261.....	§ 745
§ 224.....	§ 695	§ 262.....	§ 746
§ 225.....	§ 696	§ 263.....	§ 747
§ 226.....	§ 697	§ 264.....	§ 752
§ 227.....	§ 698	§ 265.....	§ 753
§ 228.....	§ 699	§ 266.....	§ 754
§ 229.....	§ 700	§ 267.....	§ 755
§ 230.....	§ 701	§ 268.....	§ 756
§ 231.....	§ 702	§ 269.....	§ 757
§ 232.....	§ 703	§ 270.....	§ 758
§ 233.....	§ 704	§ 271.....	§ 759
§ 234.....	§ 705	§ 272.....	§ 760
§ 235.....	§ 706	§ 273.....	§ 761
§ 236.....	§ 707	§ 274.....	§ 762
§ 237.....	§ 708	§ 275.....	§ 763
§ 238.....	§ 714	§ 276.....	§ 764
§ 239.....	§ 715	§ 277.....	§ 765

Practice Act.	Code C. P.	Practice Act.	Code C. P.
§ 278.....	§ 766	§ 316.....	§ 809
§ 279.....	§ 767	§ 317.....	§ 812
§ 280.....	§ 768	§ 318.....	§ 814
§ 281.....	§ 769	§ 319.....	§ 815
§ 282.....	§ 770	§ 320.....	§ 816
§ 283.....	§ 771	§ 321.....	§ 817
§ 284.....	§ 772	§ 322.....	§ 818
§ 285.....	§ 773	§ 323.....	§ 819
§ 286.....	§ 774	§ 324.....	§ 820
§ 287.....	§ 775	§ 325.....	§ 821
§ 288.....	§ 776	§ 326.....	§ 822
§ 289.....	§ 777	§ 327.....	§ 823
§ 290.....	§ 778	§ 328.....	§ 824
§ 291.....	§ 779	§ 329.....	§ 825
§ 292.....	§ 780	§ 330.....	§ 826
§ 293.....	§ 781	§ 331.....	§ 827
§ 294.....	§ 782	§ 332.....	§ 827
§ 295.....	§ 783	§ 333.....	§ 936
§ 296.....	§ 784	§ 334.....	§ 937
§ 297.....	§ 785	§ 335.....	§ 938
§ 298.....	§ 786	§ 336.....	§ 939
§ 299.....	§ 787	§ 337.....	§ 940
§ 300.....	§ 788	§ 338.....	
§ 301.....	§ 789	§ 339.....	
§ 302.....	§ 790	§ 340.....	
§ 303.....	§ 791	§ 341.....	
§ 304.....	§ 792	§ 342.....	
§ 305.....	§ 793	§ 343.....	
§ 306.....	§ 794	§ 344.....	
§ 307.....	§ 795	§ 345.....	§ 956
§ 308.....	§ 796	§ 346.....	§ 950-954
§ 309.....	§ 797	§ 347.....	§ 963
§ 310.....	§ 802	§ 348.....	§ 941
§ 311.....	§ 804	§ 349.....	§ 942
§ 312.....	§ 805	§ 350.....	§ 943
§ 313.....	§ 806	§ 351.....	§ 944
§ 314.....	§ 807	§ 352.....	§ 945
§ 315.....	§ 808	§ 353.....	§ 946

Appeals
§§ 936-959

Practice Act.	Code C. P.	Practice Act.	Code C. P.
§ 354	§ 947	§ 392	§ 1879
§ 355.....	§ 948	§ 393 Repealed	1870
§ 356.....	§ 949	§ 394.....	§ 1880
§ 357.....		§ 395.....	§ 1881
§ 358.....	§ 958	§ 396.....	§ 1881
§ 359.....	§ 966	§ 397... ..	§ 1881
§ 360.....	§ 941	§ 398.....	§ 1881
§ 361.	§ 941	§ 399.....	§ 1881
§ 362.....	§ 941	§ 400.....	§ 1883
§ 363.....	Repealed	§ 401.....	§ 1884
§ 364.....		§ 402.....	§ 1985
§ 365.....		§ 402.....	§ 1989
§ 366.....		§ 403.....	§ 1986
§ 367.....		§ 980	§ 404.....
§ 368.....	§ 989	§ 405.....	§ 1988
§ 369.....	§ 990	§ 406.....	§ 1990
§ 370.....	§ 991	§ 407.....	§ 2064
§ 371.....	§ 992	§ 408.....	§ 2065
§ 372.....	§ 993	§ 409.....	§ 1991
§ 373.....	§ 994	§ 410.....	§ 1992
§ 374.	§ 1182	§ 411.....	§ 1993
§ 375.....	§ 1183	§ 412.....	§ 1995
§ 376.....	§ 1184	§ 413.....	§ 1996
§ 377.....	§ 1188	§ 414.....	§ 1997
§ 378.....	§ 1189	§ 415.....	§ 2067
§ 379.....	§ 1140	§ 416.....	§ 2068-9
§ 380.....	§ 1281	§ 417.....	
§ 381.....	§ 1282	§ 418.....	
§ 382.....	§ 1283	§ 419.....	Repealed, '63, 701
§ 383.....	§ 1284	§ 420.....	
§ 384.....	§ 1285	§ 421.....	
§ 385.....	§ 1286	§ 422.....	
§ 386.....	§ 1287	§ 423.....	
§ 387.....	§ 1288	§ 424.....	§ 2012
§ 388.....	§ 1289	§ 425.....	§ 2013
§ 389.....	§ 1290	§ 426... ..	§ 2014
§ 390.....	§ 997	§ 427.....	§ 2015
§ 391.....	§ 1879	§ 428... ..	§ 2021

Practice Act.	Code C. P.	Practice
§ 429.....	§ 2081	§ 467
§ 490.....	§ 2082	§ 468
§ 431.....	§ 2084	§ 469
§ 432.....	§ 2080	§ 470
§ 433.....	§ 2024	§ 471
§ 434.....	§ 2025	§ 472
§ 435.....	§ 2026	§ 473
§ 436.....	§ 2027	§ 474
§ 437.....	§ 2088	§ 475
§ 438.....	§ 2084	§ 476
§ 439.....	§ 2085	§ 477
§ 440.....	§ 2086	§ 478
§ 441.....	§ 2087	§ 479
§ 442.....	§ 2088	§ 480
§ 443.....	§ 2093	§ 481
§ 444.....	§ 2096	§ 482
§ 445.....	§ 2097	§ 483
§ 446.....	§ 1000	§ 484
§ 447.....	§ 1855	§ 485
§ 448.....	§ 1982	§ 486
§ 449.....	§ 1905	§ 487
§ 450.....	§ 1905-82	§ 488
§ 451.....	§ 1906	§ 489
§ 452.....	§ 1907	§ 491
§ 453.....	§ 1900	§ 492
§ 454.....	§ 1930-81	§ 493
§ 455.....	§ 1067	§ 494
§ 456.....	§ 1068	§ 495
§ 457.....	§ 1069	§ 496
§ 458.....	§ 1070	§ 497
§ 459.....	§ 1071	§ 498
§ 460.....	§ 1072	§ 499
§ 461.....	§ 1073	§ 500
§ 462.....	§ 1074	§ 501
§ 463.....	§ 1075	§ 502
§ 464.....	§ 1076	§ 503
§ 465.....	§ 1077	§ 504
§ 466.....	§ 1084	§ 505

Practice Act.	Code O. P.	Practice Act.	Code C. P.
§ 506.....	§ 1030	§ 545.....	§ 862
§ 507.....	§ 1031	§ 546.....	§ 863
§ 508.....	§ 1032	§ 547.....	§ 864
§ 509 Canceled		§ 548.....	§ 865
§ 510.....	§ 1033	§ 549.....	§
§ 511.....	§ 1035	§ 550.....	§ 875
§ 512.....	§ 1036	§ 551.....	§ 865-528
§ 513.....	§ 1037	§ 552.....	§ 866
§ 514.....	§ 1037	§ 553.....	§ 867
§ 515.....	§ 1003	§ 554.....	§ 868
§ 516.....	§ 1004	§ 555.....	§ 869
§ 517.....	§ 1005	§ 556.....	§ 870
§ 518.....	§ 1006	§ 557.....	§ 870
§ 519.....	§ 1010-16	§ 558.....	§ 870
§ 520.....	§ 1011	§ 559.....	§ 870
§ 521.....	§ 1012	§ 560.....	§ 870
§ 522.....	§ 1013	§ 561.....	§ 870
§ 523.....	§ 1014	§ 562.....	§ 870
§ 524.....	§ 1015	§ 563.....	§ 870
§ 525.....	§ 1047	§ 564.....	§ 870
§ 526.....	§ 1048	§ 565.....	§ 870
§ 527.....	§ 1050	§ 566.....	§ 870
§ 528.....	§ 1052	§ 567.....	§ 1057
§ 529.....	§ 1053	§ 568.....	§ 978
§ 530.....	§ 1054	§ 569.....	§ 870
§ 531.....	§ 1046	§ 570.....	§ 852
§ 532.....	§ 861	§ 571.....	§ 851
§ 534.....	§ 842	§ 572.....	§ 851
§ 535.....	§ 832	§ 573.....	§ 852
§ 536.....	§ 839	§ 574.....	§ 855
§ 537.....		§ 576.....	§ 826
§ 538.....	§ 839	§ 577.....	§ 837
§ 539.....	§ 843	§ 578.....	§ 854-6-7
§ 540.....	§ 844	§ 579.....	§ 469
§ 541.....	§ 845	§ 580.....	§ 858
§ 542.....	§ 849	§ 581.....	§ 833
§ 543.....	§ 849	§ 582.....	§ 833
§ 544.....	§ 861	§ 583.....	§ 875-6

Practice Act.	Code O. P.	Practice Act.	Code O. P.
§ 584.....	§ 875-6	§ 623.....	§ 659
§ 585.....	§ 877	§ 624.....	§ 974
§ 586.....	§ 870-73	§ 625.....	§ 975
§ 587.....	§ 881-3	§ 626.....	§ 976
§ 588.....	§ 850	§ 627.....	§ 977
§ 589.....	§ 837	§ 628.....	§ 978
§ 590.....	§ 885	§ 629.....	§ 979
§ 591.....	§ 890	§ 630 Repealed	1854, 100
§ 592.....	§ 870-1	§ 631.....	§ 924
§ 593.....	§ 881	§ 632 Repealed	1855, 250
§ 594.....	§ 891-3	§ 633.....	§ 921
§ 595.....	§ 894	§ 634.....	§ 923
§ 596.....	§ 895	§ 635.....	§ 925
§ 597.....	§ 898	§ 636.....	§ 929
§ 598.....	§ 896	§ 637.....	§ 930
§ 599.....	§ 897-900	§ 638.....	§ 931
§ 600.....	§ 901	§ 639.....	§ 932
§ 601.....	§ 902	§ 640.....	§ 974
§ 602.....	§ 904	§ 641.....	§ 933
§ 603.....	§ 925	§ 643.....	§ 129-30
§ 604.....	§ 911	§ 645.....	§ 1055
§ 605.....	§ 912	§ 646.....	§ 1056
§ 606.....	§ 918	§ 647.....	§ 1058
§ 607.....	§ 914-915	§ 650.....	§ 1057
§ 608.....	§ 916	§ 651.....	§ 564-69
§ 609.....	§ 917	§ 652.....	§ 564-69
§ 610.....	§ 918	§ 653.....	§ 1108
§ 611.....	§ 920	§ 654.....	§ 548
§ 612.....	§ 922	§ 655.....	§ 1918-19
§ 613.....	§ 849	§ 656.....	§ 388
§ 614.....	§ 849	§ 658.....	§ 386
§ 616.....	§ 906	§ 659.....	§ 387
§ 617.....	§ 907-9	§ 660.....	§ 387
§ 618.....	§ 910	§ 661.....	§ 387
§ 619.....	§ 919	§ 662.....	§ 387
§ 620.....	§ 3019	§ 663.....	§ 1051
§ 621.....	§ 748	§ 664.....	§ 596
§ 622.....	§ 657	§ 625.....	§ 1034

CORRESPONDING SECTIONS—PROBATE ACT AND CODE.

Probate Act.	Code C. P.	Probate Act.	Code C. P.
§ 2.....	§ 1294	§ 41.....	§ 1249
§ 3.....	§ 1295	§ 42.....	§ 1250
§ 4.....	§ 1298	§ 43.....	§ 1251
§ 5.....	§ 1299	§ 44.....	§ 1252
§ 6.....	§ 1300	§ 45.....	§ 1253
§ 7.....	§ 1298	§ 46.....	§ 1254
§ 8.....	§ 1290	§ 47.....	§ 1255
§ 9.....	§ 1299	§ 48.....	§ 1256
§ 10.....	§ 1302	§ 49.....	§ 1256
§ 11.....	§ 1202	§ 50.....	§ 1260
§ 12.....	§ 1305	§ 51.....	§ 1261
§ 13.....	§ 1203	§ 52.....	§ 1265
§ 14.....	§ 1204	§ 53.....	§ 1266
§ 15.....	§ 1304	§ 54.....	§ 1267
§ 16.....	§ 1203	§ 55.....	§ 1269
§ 17.....	§ 1206	§ 56.....	§ 1270
§ 18.....	§ 1207	§ 57.....	§ 1268
§ 19.....	§ 1208	§ 58.....	§ 1271
§ 20.....	§ 1212	§ 59.....	§ 1272
§ 21.....	§ 1215	§ 60.....	§ 1272
§ 22.....	§ 1215	§ 61.....	§ 1274
§ 23.....	§ 1216	§ 62.....	§ 1275
§ 24.....	§ 1217	§ 63.....	§ 1276
§ 25.....	§ 1218	§ 64.....	§ 1277
§ 27.....	§ 1222	§ 65.....	§ 1278
§ 28.....	§ 1223	§ 66.....	§ 1279
§ 29.....	§ 1224	§ 67.....	§ 1282
§ 30.....	§ 1227	§ 68.....	§ 1284
§ 31.....	§ 1228	§ 69.....	§ 1285
§ 32.....	§ 1229	§ 70.....	§ 1286
§ 33.....	§ 1230	§ 71.....	§ 1282
§ 34.....	§ 1231	§ 72.....	§ 1287
§ 35.....	§ 1232	§ 73.....	§ 1288-90
§ 36.....	§ 1232	§ 74.....	§ 1291
§ 37.....	§ 1232	§ 75.....	§ 1292
§ 38.....	§ 1232	§ 76.....	§ 1292
§ 39.....	§ 1240	§ 77.....	§ 1296
§ 40.....	§ 1241	§ 78.....	§ 1297

Probate Act.	Code C. P.	Probate Act.	Code C. P.
§ 79	§ 1398	§ 117	§ 1459
§ 80	§ 1399	§ 118	§ 1460
§ 81	§ 1400	§ 119	§ 1461
§ 82	§ 1401	§ 120	§ 1464
§ 83	§ 1402	§ 121	§ 1465-76
§ 84	§ 1403	§ 122	§ 1466
§ 85	§ 1404	§ 123	§ 1467
§ 86	§ 1405	§ 125	§ 1468
§ 87	§ 1406	§ 126	§ 1469
§ 88	§ 1411	§ 127	§ 1470
§ 89	§ 1412	§ 128	§ 1490-91
§ 90	§ 1412	§ 129	§ 1492
§ 91	§ 1414	§ 130	§ 1493
§ 92	§ 1415	§ 131	§ 1394-95
§ 93	§ 1416	§ 132	§ 1496
§ 94	§ 1417	§ 133	§ 1497
§ 95	§ 1411	§ 134	§ 1498
§ 96	§ 1425	§ 135	§ 1499
§ 97	§ 1426	§ 136	§ 1500
§ 98	§ 1423	§ 137	§ 1501
§ 99	§ 1424	§ 138	§ 1502
§ 100	§ 1427	§ 139	§ 1503
§ 101	§ 1428	§ 140	§ 1504
§ 102	§ 1429	§ 141	§ 1505
§ 103	§ 1430	§ 142	§ 1507
§ 104	§ 1432-33	§ 143	§ 1508
§ 105	§ 1443	§ 144	§ 1509
§ 106	§ 1444	§ 145	§ 1510
§ 107	§ 1445	§ 146	§ 1511
§ 108	§ 1446	§ 147	§ 1512
§ 109	§ 1447	§ 148	§ 1517
§ 110	§ 1448	§ 149	§ 1518
§ 111	§ 1449	§ 150	§ 1522-23
§ 112	§ 1450	§ 151	§ 1525
§ 113	§ 1451	§ 152	§ 1526
§ 114	§ 1452-53	§ 153	§ 1526
§ 115	§ 1516	§ 153	§ 1530-31
§ 116	§ 1458	§ 154	§ 1524

Probate Act.	Code C. P.	Probate Act.	Code C. P.
§ 155.....	§ 1537	§ 193.....	§ 1576
§ 156.....	§ 1538	194.....	§ 1581
§ 157.....	§ 1539	, 195.....	§ 1583
§ 158.....	§ 1540	§ 196.....	§ 1583
§ 159.....	§ 1539	§ 197.....	§ 1584
§ 160.....	§ 1541	§ 198.....	§ 1585
§ 161.....	§ 1542	§ 199.....	§ 1586
§ 162.....	§ 1543	§ 200.....	§ 1587
§ 163.....	§ 1544	§ 201.....	§ 1588
§ 164.....	§ 1545	§ 202.....	§ 1589
§ 165.....	§ 1546	§ 203.....	§ 1590
§ 166.....	§ 1547	§ 204.....	§ 1591
§ 167.....	§ 1548-50	§ 205.....	§ 1597
§ 168.....	§ 1551	§ 206.....	§ 1598
§ 169.....	§ 1552	§ 207.....	§ 1599
§ 170.....	§ 1553	§ 208.....	§ 1600
§ 171.....	§ 1554	§ 209.....	§ 1601
§ 172.....	§ 1555	§ 210.....	§ 1602
§ 173.....	§ 1556	§ 211.....	§ 1603
§ 174.....	§ 1557	§ 212.....	§ 1604
§ 175.....	§ 1558	§ 213.....	§ 1605
§ 176.....	§ 1559	§ 214.....	§ 1606-7
§ 177.....	§ 1560	§ 215.....	§ 1612
§ 178.....	§ 1561	§ 216.....	§ 1613
§ 179.....	§ 1562	§ 217.....	§ 1614
§ 180.....	§ 1563	§ 218.....	§ 1615
§ 181.....	§ 1564	§ 219.....	§ 1616
§ 182.....	§ 1565	§ 220.....	§ 1617
§ 183.....	§ 1566	§ 221.....	§ 1618
§ 184.....	§ 1567	§ 222.....	§ 1622
§ 185.....	§ 1568	§ 223.....	§ 1623
§ 186.....	§ 1569-70	§ 224.....	§ 1624
§ 187.....	§ 1569	§ 225.....	§ 1625
§ 188.....	§ 1571	§ 226.....	§ 1626
§ 189.....	§ 1572	§ 227.....	§ 1627
§ 190.....	§ 1573	§ 228.....	§ 1628
§ 191.....	§ 1574	§ 229.....	§ 1629
§ 192.....	§ 1575	§ 230.....	§ 1630

Probate Act.	Code C. P.	Probate Act.	Code C. P.
§ 231.....	§ 1631	§ 270.....	§ 1698
§ 232.....	§ 1632	§ 271.....	§ 1694
§ 233.....	§ 1633	§ 272.....	§ 1695
§ 234.....	§ 1635	§ 273.....	§ 1696
§ 235.....	§ 1636	§ 274.....	§ 1691
§ 236.....	§ 1636	§ 275.....	§ 1692
§ 237.....	§ 1637	§ 276.....	§ 1693
§ 238.....	§ 1638	§ 277.....	§ 1695
§ 239.....	§ 1643	§ 278.....	§ 1696
§ 240.....	§ 1644	§ 279.....	§ 1697
§ 241.....	§ 1645	§ 280.....	§ 1698
§ 242.....	§ 1646	§ 281.....	§ 1436
§ 243.....	§ 1647	§ 282.....	§ 1411
§ 244.....	§ 1648	§ 283.....	§ 1437
§ 245.....	§ 1649	§ 284.....	§ 1438
§ 246.....	§ 1650	§ 285.....	§ 1439
§ 247.....	§ 1651	§ 286.....	§ 1440
§ 248.....	§ 1652	§ 287.....	§ 1704-5
§ 249.....	§ 1653	§ 288.....	§ 1710
§ 250.....	§ 1658	§ 289.....	§ 1709
§ 251.....	§ 1659	§ 290.....	§ 1711
§ 252.....	§ 1660	§ 291.....	§ 2093
§ 253.....	§ 1661	§ 293.....	§ 1713
§ 254.....	§ 1661	§ 294.....	§ 1016-17
§ 255.....	§ 1661	§ 295.....	§ 1713
§ 256.....	§ 1661	§ 296.....	§ 1719
§ 257.....	§ 1662	§ 297.....	
§ 258.....	§ 1665	§ 298.....	
§ 259.....	§ 1666-67	§ 299.....	
§ 260.....	§ 1668-69	§ 300.....	
§ 261.....	§ 1675	§ 301.....	
§ 262.....	§ 1677	§ 302.....	§ 1730
§ 263.....	§ 1676	§ 302.....	§ 1733
§ 264.....	§ 1678	§ 302.....	§ 1739
§ 265.....	§ 1679	§ 304.....	§ 1738
§ 266.....	§ 1680	§ 305.....	§ 1739
§ 267.....	§ 1681	§ 305.....	§ 1741-42
§ 268.....	§ 1682	§ 306.....	§ 1730

Probate Act.	Code C. P.	Probate Act.	Code C. P.
§ 307.....	§ 1731	§ 354.....	§ 1773
§ 308.....	§ 1732	§ 355.....	§ 1777
§ 309.....	§ 1733	§ 356.....	§ 1778
§ 310.....	§ 1734	§ 357.....	§ 1779
§ 311.....	§ 1735	§ 358.....	§ 1780
§ 312.....	§ 1736	§ 359.....	§ 1781
§ 315.....		§ 360.....	§ 1782
§ 316.....		§ 361.....	§ 1783
§ 317.....		§ 362.....	§ 1784
§ 318.....		§ 363.....	§ 1785
§ 319.....		§ 364.....	§ 1786
§ 320.....		§ 365.....	§ 1787
§ 321.....		§ 366.....	§ 1788
§ 322.....		§ 367.....	§ 1789
§ 323.....		§ 368.....	§ 1790
§ 324.....		§ 369.....	§ 1803
§ 325.....		§ 370.....	§ 1774
§ 326.....		§ 371.....	§ 1792
§ 328.....	§ 1269	§ 372.....	§ 1801
§ 329.....	§ 1271	§ 373.....	§ 1802
§ 331.....	§ 1272	§ 374.....	§ 1803
§ 336.....	§ 1747	§ 375.....	§ 1804
§ 337.....	§ 1748	§ 376.....	§ 1805
§ 338.....	§ 1749	§ 377.....	§ 1806
§ 339.....	§ 1750	§ 378.....	§ 1793
§ 340.....	§ 1751	§ 379.....	§ 1794
§ 341.....	§ 1752	§ 380.....	§ 1795
§ 342.....	§ 1752-54	§ 381.....	§ 1796
§ 343.....	§ 1754	§ 382.....	§ 1776
§ 344.....	§ 1757	§ 383.....	§ 1807
§ 345.....	§ 1758	§ 384.....	§ 1775
§ 346.....	§ 1759	§ 385.....	§ 1791
§ 347.....	§ 1762	§ 386.....	§ 1797
§ 348.....	§ 1764	§ 387.....	§ 1798
§ 349.....	§ 1765	§ 388.....	§ 1799
§ 350.....	§ 1768	§ 389.....	
§ 351.....	§ 1769	§ 390.....	
§ 352.....	§ 1770	§ 391.....	
§ 353.....	§ 1772	§ 392.....	

Civil Code
Sections
262-267

AN ACT TO ESTABLISH A
CODE OF CIVIL PROCEDURE.

*The People of the State of California, represented in Senate
and Assembly, do enact as follows :*

TITLE OF ACT.

§ 1. Title and division of this volume.

§ 1. This act shall be known as THE CODE OF CIVIL PROCEDURE OF CALIFORNIA, and is divided into four parts, as follows :

- PART I. OF COURTS OF JUSTICE.
- II. OF CIVIL ACTIONS.
- III. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE.
- IV. OF EVIDENCE.

THE
CODE OF CIVIL PROCEDURE
OF CALIFORNIA.

PRELIMINARY PROVISIONS.

2. When this Code takes effect.
3. Not retroactive.
4. Rule of construction of this Code.
5. Provisions similar to existing laws, how construed.
6. Tenure of office preserved.
7. Construction of repeal as to certain officers.
8. Actions, etc., not affected by this Code.
9. Limitations shall continue to run.
10. Holidays.
11. Same.
12. Computation of time.
13. Certain acts not to be done on holidays.
14. "Seal" defined.
15. Joint authority.
16. Words and phrases.
17. Certain terms used in this Code defined.
18. Statutes, etc., inconsistent with Code repealed.
19. This act, how cited, enumerated.
20. Judicial remedies defined.
21. Division of judicial remedies.
22. Action defined.
23. Special proceeding defined.
24. Division of actions.
25. Civil actions arise out of obligations or injuries.
26. Obligation defined.
27. Division of injuries.
28. Injuries to property.
29. Injuries to the person.
30. Civil action, by whom prosecuted.
31. Criminal actions.
32. Civil and criminal remedies not merged.

§ 2. This Code takes effect at twelve o'clock noon, on the first day of January, eighteen hundred and seventy-three.

See secs. 8, 18.

§ 3. No part of it is retroactive, unless expressly so declared.

See sec. 18.

Retroactive—1 Cal. 65; 4 Cal. 127; 5 Cal. 402; 6 Cal. 430; 23 Cal. 320; 30 Cal. 143; 39 Cal. 309; 52 Cal. 293.

§ 4. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

Construction of statutes—See secs. 1858, 1859; 6 Cal. 359; 11 Cal. 215; 13 Cal. 88; 17 Cal. 487; 31 Cal. 359; 45 Cal. 429; 49 Cal. 68.

Title of act—5 Cal. 195; 10 Cal. 315; 16 Cal. 359; 19 Cal. 512; 36 Cal. 595; 47 Cal. 222; 51 Cal. 304, 624; 53 Cal. 459, 553.

Conflict of codes—51 Cal. 295.

State practice and Federal courts—51 Cal. 479.

Liberal interpretation of Code—See secs. 452, 475.

§ 5. The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments.

Remedy, when cumulative—2 Cal. 243.

§ 6. All persons who at the time this Code takes effect hold office under any of the acts repealed continue to hold the same according to the tenure thereof, except those offices which are not continued by one of the codes adopted at this session of the Legislature.

§ 7. When any office is abolished by the repeal of any act, and such act is not in substance re-enacted or continued in either of the codes, such office ceases at the time the codes take effect.

Repeal—19 Cal. 512; 49 Cal. 273.

§ 8. No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this Code as far as applicable.

See Civil Code, secs. 6, 20; also repealing clause at the end of this Code.

Pending actions—23 Cal. 47; 31 Cal. 122; 45 Cal. 221; 46 Cal. 643; 47 Cal. 59, 645; 48 Cal. 29, 646; 49 Cal. 269, 340, 446, 454.

Right accrued—48 Cal. 643.

§ 9. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already

run shall be deemed part of the time prescribed as such limitation by this Code. [In effect July 1st, 1874.]

See secs. 361, 362; also 6 Cal. 430; 50 Cal. 612.

§ 10. Holidays within the meaning of this Code are: every Sunday, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving, or holiday. If the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, or the twenty-fifth day of December, fall upon a Sunday, the Monday following is a holiday. [In effect April 9th, 1880.]

See sec. 134.

§ 11. If the first day of January, the twenty-second day of February, the fourth day of July, or the twenty-fifth day of December, falls upon a Sunday, the Monday following is a holiday. [In effect July 1st, 1874.]

§ 12. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

See sec. 476.

Fraction of day—1 Cal. 415; 14 Cal. 567; 49 Cal. 285, 289.

Operation of statute—1 Cal. 407.

Computation of time—8 Cal. 412; 15 Cal. 334; 30 Cal. 525; 33 Cal. 487; 51 Cal. 514.

Sunday—6 Cal. 660; 31 Cal. 241, 272; 47 Cal. 579; 50 Cal. 210.

§ 13. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

§ 14. When the seal of a court, public officer, or person, is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto.

See secs. 147 to 153, and 1929 to 1934.

Seal, sufficiency of—5 Cal. 230, 315; 13 Cal. 221, 510; 15 Cal. 363; 20 Cal. 150.

Imports consideration—10 Cal. 462.

Distinction abolished—12 Cal. 236; 13 Cal. 34.

Under Mexican system—5 Cal. 467; 7 Cal. 154; 12 Cal. 149.

Generally—6 Cal. 664; 12 Cal. 564; 13 Cal. 45, 221, 502; 14 Cal. 20; 16 Cal. 18, 201; 22 Cal. 151; 25 Cal. 539; 31 Cal. 67; 32 Cal. 450; 33 Cal. 11.

§ 15. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

Talcott v. Blanding, March 10th, 1880.

§ 16. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.

§ 17. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose;" signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness.

The following words also have in this Code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes both real and personal property.

2. The words "real property" are coextensive with lands, tenements, and hereditaments.

3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.

4. The word "month" means a calendar month, unless otherwise expressed.

5. The word "will" includes codicils.

6. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer, and the word "process" a writ or summons issued in the course of judicial proceedings.

7. The word "State," when applied to the different

PRELIMINARY PROVISIONS.

§ 18-22

Part of the United States, includes the District of Columbia and the Territories; and the words "United States" may include the District and Territories. [In effect July 1st, 1891.]

- From Cal. 34
- From Cal. 35; 9 Cal. 41, 52
- From Cal. 36
- From Cal. 37; 2 Cal. 174; 22 Cal. 371
- From Cal. 38
- From Cal. 39
- From Cal. 40

§ 18 No statute, law, or rule is continued in force, be-
cause it is inconsistent with the provisions of this Code on
the same subject; but in all cases provided for by this
Code, the laws, and rules heretofore in force in
this State whether consistent or not with the provisions
of this Code, unless expressly continued in force by it,
are repealed and abrogated.

This repeal or abrogation does not revive any former
law heretofore repealed, nor does it affect any right al-
ready existing or accrued, or any action or proceeding
already taken, except as in this Code provided; nor does
it affect any private statute not expressly repealed.

See sec. 15; also repealing clause at the end of this Code.
Repeals generally—6 Cal. 281; 8 Cal. 377; 19 Cal. 501; 20 Cal. 95; 39
Cal. 1; 41 Cal. 435; 46 Cal. 57; 49 Cal. 273.

Repeals by implication—7
Cal. 3; 5 Cal. 3; 31 Cal. 412; 57.
Conflicting and conflicting statutes—5 Cal. 414; 6 Cal. 92; 20 Cal.
1; 2 Cal. 32; 36 Cal. 522; 38 Cal. 573; 43 Cal. 560; 44 Cal. 430; 46 Cal.
49 Cal. 324

Consecutive statutes—6 Cal. 41; 31 Cal. 34, 122; 35 Cal. 708.
Statutes continued in force—49 Cal. 302, 596; 50 Cal. 117; 53 Cal. 351,
71.

Limitations—See sec. 9.
Retroactive effect—See sec. 1.

§ 19 This act, whenever cited, enumerated, referred
to, or amended, may be designated simply as the "Code
of Civil Procedure," adding, when necessary, the number
of the section.

§ 20 Judicial remedies are such as are administered
by the courts of justice, or by judicial officers empowered
for that purpose by the constitution and statutes of this
State.

§ 21 These remedies are divided into two classes:
1. Actions; and,
2. Special proceedings.

§ 22 An action is an ordinary proceeding in a court of
justice, by which one party prosecutes another, for the en-

enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

§ 23. Every other remedy is a special proceeding.

See secs. 52, 75, 1022, 1063, 1064, 1109, 1110, and Part III of this Code, generally.

Special proceedings—5 Cal. 43, 279; 13 Cal. 145; 14 Cal. 479; 15 Cal. 91; 19 Cal. 218; 24 Cal. 126, 449, 457; 31 Cal. 63, 261; 34 Cal. 635; 42 Cal. 35; 49 Cal. 139.

§ 24. Actions are of two kinds:

1. Civil; and,
2. Criminal.

See Part II of this Code, sec. 307, *et seq.*

§ 25. A civil action arises out of—

1. An obligation.
2. An injury.

See Cal. 465.

§ 26. An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from:

1. Contract; or,
2. Operation of law. [In effect July 1st, 1874.]

See Civil Code, sec. 1427, *et seq.*

§ 27. An injury is of two kinds:

1. To the person; and,
2. To property.

§ 28. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it.

Cause of injury—45 Cal. 534.

§ 29. Every other injury is an injury to the person.

§ 30. A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong.

See sec. 307, *et seq.*

§ 31. The Penal Code defines and provides for the prosecution of a criminal action.

§ 32. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

PART I.
OF COURTS OF JUSTICE.

TITLE I.

ORGANIZATION AND JURISDICTION.

- CHAP. I. COURTS OF JUSTICE IN GENERAL. §§ 33, 34.**
- II. COURT OF IMPEACHMENT. §§ 36-39.**
- III. SUPREME COURT. §§ 40-56.**
- IV. SUPERIOR COURTS. §§ 65-79.**
- V. JUSTICES' COURTS. §§ 85-115.**
- VI. POLICE COURTS, § 121.**
- VII. GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE. §§ 124-153.**

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

§ 33. The several courts of this State.

§ 34. Courts of record.

§ 33. The following are the Courts of Justice of this State:

1. The Court of Impeachment;
2. The Supreme Court;
3. The Superior Courts;
4. The Justices' Courts;
5. The Police Courts, and such other inferior courts as the Legislature may establish in any incorporated city or town, or city and county.

See Const. Cal. arts. 3 and 6.

For subd. 5, see Const. Cal. art. 6, sec. 13.

JURISDICTION.

Acquired—how, 16 Cal. 389; 34 Cal. 391; 35 Cal. 528; 39 Cal. 428; 39 Cal. 429; 44 Cal. 356; 46 Cal. 610; 50 Cal. 68, 203, 496; 53 Cal. 44.

Adjournment—effect of, 1 Cal. 409; 4 Cal. 280; 7 Cal. 53; 19 Cal. 707; 25 Cal. 49, 170; 27 Cal. 172, 492; 28 Cal. 335; 30 Cal. 192; 34 Cal. 329, 479; 39 Cal. 189; 44 Cal. 85. But see secs. 47, 48, 73, 74.

Admiralty and maritime—1 Cal. 485; 2 Cal. 306; 5 Cal. 268; 6 Cal. 143; 9 Cal. 697; 13 Cal. 370; 34 Cal. 676; 42 Cal. 227; 50 Cal. 236.

Admission—See sec. 415, subd. 4, and sec. 416.

Agreement as to—2 Cal. 74; 8 Cal. 563; 14 Cal. 279; 19 Cal. 125; 40 Cal. 183; 42 Cal. 125; 43 Cal. 393; 50 Cal. 447.

Amount—limitations as to, 1 Cal. 15; 3 Cal. 220; 5 Cal. 230; 10 Cal. 249; 17 Cal. 693; 22 Cal. 170; 24 Cal. 61; 30 Cal. 245, 546; 34 Cal. 28; 35 Cal. 269; 39 Cal. 570; 40 Cal. 628; 45 Cal. 71; 48 Cal. 160.

Appeal—1 Cal. 15; 2 Cal. 99; 3 Cal. 426; 4 Cal. 368; 6 Cal. 635; 8 Cal. 297; 9 Cal. 698; 10 Cal. 50, 249; 11 Cal. 176; 15 Cal. 502; 20 Cal. 39, 338; 22 Cal. 82; 30 Cal. 99, 546; 31 Cal. 83, 261; 34 Cal. 28; 35 Cal. 213; 39 Cal. 92; 42 Cal. 35; 45 Cal. 71; 47 Cal. 7, 109; 49 Cal. 139; 50 Cal. 211.

Appearance—21 Cal. 52; 28 Cal. 668; 30 Cal. 440; 31 Cal. 342; 34 Cal. 57; 42 Cal. 484.

Bankruptcy—47 Cal. 481; 48 Cal. 439, 452; 53 Cal. 267.

Certiorari—4 Cal. 186; 21 Cal. 167; 26 Cal. 372; 30 Cal. 99; 39 Cal. 570; 37 Cal. 454; 40 Cal. 479, 481; 43 Cal. 365; 47 Cal. 7.

Common law—2 Cal. 99, 146; 6 Cal. 359; 39 Cal. 98.

Concurrent—2 Cal. 308; 7 Cal. 348; 8 Cal. 27, 34, 67, 268; 9 Cal. 77, 607; 21 Cal. 438; 30 Cal. 573; 42 Cal. 227.

Consent—See AGREEMENT.

Constitutional changes, as to—21 Cal. 415; secs. 51, 52, 75, 76, 77, 112, 113, 114.

Constitutionality of laws—7 Cal. 65; 10 Cal. 293; 11 Cal. 176; 13 Cal. 24; 17 Cal. 548; 24 Cal. 427; 28 Cal. 118; 30 Cal. 99; 31 Cal. 261; 32 Cal. 242; 33 Cal. 212; 34 Cal. 520; 41 Cal. 147; 42 Cal. 316.

Co-ordinate, 9 Cal. 77, 608; 10 Cal. 495.

Costs—30 Cal. 546; 50 Cal. 30.

Courts—jurisdiction as to other, 8 Cal. 27, 34, 67, 268; 9 Cal. 77, 607; 11 Cal. 76; 37 Cal. 268; 39 Cal. 157; 49 Cal. 331; 51 Cal. 145, 562.

Definition—10 Cal. 293; 43 Cal. 365; 44 Cal. 85.

Demurrer to—16 Cal. 432.

Equity—3 Cal. 130; 6 Cal. 378; 7 Cal. 348; 10 Cal. 529, 575; 13 Cal. 521, 563, 597, 626; 21 Cal. 438; 24 Cal. 61; 30 Cal. 440; 33 Cal. 45; 36 Cal. 639; 38 Cal. 265; 51 Cal. 431; 53 Cal. 656.

Exclusive—2 Cal. 308; 5 Cal. 268; 33 Cal. 85, 683; 53 Cal. 16, 412.

Extent—17 Cal. 363; 36 Cal. 159; 49 Cal. 351.

Forfeiture, actions for—33 Cal. 212; 36 Cal. 281.

Fugitives—5 Cal. 238; 23 Cal. 585.

Generally—4 Cal. 307; 6 Cal. 685; 12 Cal. 128; 13 Cal. 569; 17 Cal. 363; 19 Cal. 210, 374, 388; 23 Cal. 585; 27 Cal. 492; 30 Cal. 99, 440; 31 Cal. 170; 32 Cal. 140; 33 Cal. 506; 34 Cal. 321; 37 Cal. 69; 39 Cal. 315; 41 Cal. 202, 308; 43 Cal. 313; 46 Cal. 79, 245, 398; 47 Cal. 524; 48 Cal. 70, 127, 133; 49 Cal. 351, 491; 51 Cal. 3, 255, 435.

Habeas corpus—26 Cal. 372; 34 Cal. 682; 38 Cal. 145, 393, 499; 45 Cal. 199; 51 Cal. 317.

Incidents of—See sec. 187.

Inferior and limited, courts of—5 Cal. 195; 10 Cal. 293; 12 Cal. 283; 15 Cal. 297; 16 Cal. 432; 20 Cal. 39; 21 Cal. 167; 23 Cal. 402; 28 Cal. 118; 29 Cal. 307; 33 Cal. 318; 34 Cal. 321; 35 Cal. 269; 36 Cal. 135; 39 Cal. 517; 43 Cal. 455.

Injunction—See secs. 525, 526; 37 Cal. 268.

Legislative power and functions as to—5 Cal. 9, 43, 230, 343; 6 Cal. 143, 532; 7 Cal. 65; 8 Cal. 297; 13 Cal. 24; 17 Cal. 548; 25 Cal. 605; 30 Cal. 435; 32 Cal. 242; 33 Cal. 279; 35 Cal. 624; 42 Cal. 65; 48 Cal. 279; 50 Cal. 153; 52 Cal. 142.

Limited—See INFERIOR; also, 49 Cal. 465.

Loss of—4 Cal. 280; 6 Cal. 21; 15 Cal. 76; 49 Cal. 590.

Mandamus—15 Cal. 91; 26 Cal. 372; 29 Cal. 307; 30 Cal. 245, 495; 35 Cal. 213; 36 Cal. 283, 595; 39 Cal. 189, 411.

Naturalization—39 Cal. 98.

Nuisance—30 Cal. 573; 36 Cal. 193; 40 Cal. 396.

Objections to—16 Cal. 432.

Person—See ADMISSION, APPEARANCE, PUBLICATION OF SUMMONS; 5 Cal. 494; 7 Cal. 54; 34 Cal. 391; 36 Cal. 691; 48 Cal. 610; 53 Cal. 635.

Presumption as to—2 Cal. 99, 146; 3 Cal. 426; 5 Cal. 149; 7 Cal. 291; 10 Cal. 50; 12 Cal. 283; 17 Cal. 354, 371, 424; 23 Cal. 402; 27 Cal. 67, 300; 31 Cal. 168, 342; 33 Cal. 45, 318, 505, 530; 34 Cal. 391; 40 Cal. 648; 44 Cal. 356; 49 Cal. 206; 53 Cal. 635.

Process—48 Cal. 133.

Prohibition, writ of—26 Cal. 372; 52 Cal. 516.

Publication of summons, notice, etc.—sec. 413; 12 Cal. 100, 283; 29 Cal. 81; 26 Cal. 149; 27 Cal. 295, 300; 30 Cal. 611; 31 Cal. 342; 33 Cal. 45, 506.

RE: 34 Cal. 391; 37 Cal. 458; 39 Cal. 439; 44 Cal. 356; *Belcher v. Chambers*, 5 Cal. 635, overruling *Hahn v. Kelly*, 34 Cal. 391.

Records—13 Cal. 24; 19 Cal. 127; 30 Cal. 439.

Restitution, writ of—19 Cal. 374.

Special cases—5 Cal. 43, 195; 42 Cal. 35.

Stipulation—See **AGREEMENT**.

Taxes, suits for—24 Cal. 61; 43 Cal. 492; 45 Cal. 199.

Test of—30 Cal. 546.

Trespass—39 Cal. 315, 319.

United States courts, generally—4 Cal. 368; 9 Cal. 696; 11 Cal. 176; 22 Cal. 84; 25 Cal. 605; 27 Cal. 164; 28 Cal. 98; 32 Cal. 231; 39 Cal. 318; 49 Cal. 325.

Vacation—See **ADJOURNMENT**.

Venue—37 Cal. 190; 46 Cal. 245; 49 Cal. 351.

Want of—7 Cal. 54; 8 Cal. 563; 12 Cal. 100; 16 Cal. 399; 17 Cal. 130; 23 Cal. 402; 27 Cal. 300; 28 Cal. 115; 30 Cal. 440; 34 Cal. 391; 37 Cal. 458; 39 Cal. 570; 52 Cal. 97.

"Within the jurisdiction," defined—12 Cal. 306.

Witness—36 Cal. 522.

§ 34. The courts enumerated in the first three subdivisions of the last preceding section are courts of record.

Const. Cal. art. 6, secs. 12, 22.

Court of record—definition, 34 Cal. 391; 52 Cal. 220.

CODE CIV. PROC.—4.

CHAPTER II.
COURT OF IMPEACHMENT.

- § 36. Members of the court.
- § 37. Jurisdiction.
- § 38. Officers of the court.
- § 39. Trial of impeachments provided for in the Penal Code.

§ 36. The Court of Impeachment is the Senate; when sitting as such court, the senators shall be upon oath; and at least two-thirds of the members elected shall be necessary to constitute a quorum.

Const. Cal. art. 4, sec. 17; art. 6, sec. 1.

§ 37. The court has jurisdiction to try impeachments, when presented by the Assembly, of the Governor, Lieutenant-Governor, Secretary of State, Controller, Treasurer, Attorney-General, Surveyor-General, Chief Justice of the Supreme Court, Associate Justices of the Supreme Court, and Judges of the Superior Courts, for any misdemeanor in office.

Const. Cal. art. 4, sec. 18.

Other civil officers—45 Cal. 200.

§ 38. The officers of the Senate are the officers of the court.

See Penal Code, secs. 10, and 737 to 753.

Impeachment—manner of, 45 Cal. 200.

§ 39. Proceedings on the trial of impeachments are provided for in the Penal Code.

See Penal Code, sec. 737 *et seq.*

CHAPTER III.

SUPREME COURT.

- 40. Justices, elections, and terms of office.
- 41. Computation of years of office.
- 42. Vacancies.
- 43. Departments.
- 44. Apportionment of business.
- 45. Court in bank.
- 46. Absence or disability of Chief Justice.
- 47. Sessions.
- 48. Adjournments.
- 49. Decisions in writing.
- 50. Jurisdiction of two kinds.
- 51. Original jurisdiction.
- 52. Appellate jurisdiction.
- 53. Powers in appealed cases.
- 54. Concurrence necessary to transact business.
- 55. Transfer of books, papers, and actions.
- 56. Remittitur in transferred cases.

§ 40. The Supreme Court shall consist of a Chief Justice and six Associate Justices, who shall be elected by the qualified electors of the State at large, at the general State elections next preceding the expiration of the terms of office of their predecessors respectively, and hold their offices for the term of twelve years from and after the first Monday after the first day of January next succeeding their election; *provided*, that of the justices elected at the general State election of eighteen hundred and seventy-nine, the Chief Justice shall go out of office at the end of eleven years, and the six Associate Justices shall have so classified, or shall so classify themselves, by lot, that two of them shall go out of office at the end of three years, two of them at the end of seven years, and two of them at the end of eleven years, from the first Monday after the first day of January, eighteen hundred and eighty; and an entry of such classification shall have been or shall be made in the minutes of the court in bank, signed by them, and a duplicate thereof filed in the office of the Secretary of State.

Const. Cal. art. 6, secs. 2, 3.

Eligibility—sec. 156.

Absence of judge—sec. 46; 2 Cal. 196, 610.

De facto judge—29 Cal. 485.

§ 41. The years during which a Justice of the Supreme Court is to hold office are to be computed respectively from and including the first Monday after the first day of January of any one year to and excluding the first Monday after the first day of January of the next succeeding year.

Const. Cal. art. 6, sec. 3.

§ 42. If a vacancy occur in the office of a Justice of the Supreme Court, the Governor shall appoint an eligible person to hold the office until the election and qualification of a justice to fill the vacancy, which election shall take place at the next succeeding general election; and the justice so elected shall hold the office for the remainder of the unexpired term of his predecessor.

Const. Cal. art. 6, sec. 3.

Vacancy—see sec. 40, ABSENCE OF JUDGE.

§ 43. There shall be two departments of the Supreme Court, denominated respectively Department One and Department Two. The Chief Justice shall assign three of the Associate Justices to each department, and such assignment may be changed by him from time to time; *provided*, that the Associate Justices shall be competent to sit in either department, and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the Chief Justice. The Chief Justice may sit in either department, and shall preside when so sitting; but the justices assigned to each department shall select one of their number as presiding justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court in bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers; but one or more of the justices may adjourn from time to time with the same effect as if all were present, and the concurrence of three justices shall be necessary to pronounce a judgment; *provided*, that if three do not concur, the cause may be reheard in the same department, or transmitted to the other department, or to the court in bank.

Const. Cal. art. 6, sec. 2.

Chambers, powers at—sec. 165.

Adjournment, holidays—sec. 135.

Concurrence—§2 Cal. 633.

§ 44. The Chief Justice shall apportion the business to the departments, and may, in his discretion, order any

cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but when a cause has been allotted to one of the departments and a judgment pronounced therein, the order must be made within thirty days after such judgment, and concurred in by two Associate Justices; and if so made, it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a cause to be heard in bank. If the order be not made within the time above limited, the judgment shall be final; *provided*, that no judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the Chief Justice in writing, with the concurrence of two Associate Justices.

Const. Cal. art. 6, sec. 2. See sec. 129; Supreme Ct. rule 30.

§ 45. The Chief Justice or any four justices may convene the court in bank at any time, and the Chief Justice shall be the presiding justice of the court when so convened. The presence of four justices shall be necessary to transact any business, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in the court in bank; *provided*, that if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument, but to render a judgment a concurrence of four justices shall be necessary; and every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments, and in such cases the judgment of the court in bank shall be final, unless within thirty days after such judgment an order be made in writing, signed by five justices, granting a rehearing.

Const. Cal. art. 6, sec. 2.

§ 46. In case of the absence of the Chief Justice from the place at which the court in bank is held, or his inability to act, the Associate Justices shall select one of their own number to perform the duties and exercise the powers of the Chief Justice during such absence or inability to act.

Const. Cal. art. 6, sec. 2.

§ 47. The Supreme Court shall always be open for the transaction of business. It shall hold regular sessions for the hearing of causes, either in bank, or in one or both of its departments, at the capital of the State, commencing

ing on the first Mondays of May and second Mondays of November; at the city and county of San Francisco, commencing on the second Mondays of January and third Mondays of July; and at the city of Los Angeles, commencing on the first Mondays of April and second Mondays of October; and special sessions at either of the above named places at such other times as may be prescribed by the justices thereof. The justices and officers of the Supreme Court shall be allowed their actual traveling expenses in going to and from their respective places of residence upon the business of the court, or to attend its sessions. If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the State, together with attendants, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of business, the court, or any three justices thereof, may direct the Clerk of the Supreme Court to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses thereof, certified by any three justices to be correct, shall be paid out of the State treasury, for which expenses, and to defray the traveling expenses of the justices and officers of the Supreme Court above mentioned, a sufficient sum shall be annually appropriated out of any funds in the State treasury not otherwise appropriated. The moneys so appropriated shall be subject to the order of the Clerk of the Supreme Court, and be by him disbursed on proper vouchers, and the same shall be accounted for by him in annual settlements with the Controller of State on the first Monday of December of each year.

Always open—Const. Cal. art. 6, sec. 2.

§ 48. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court, or either of its departments, from sitting at any time.

See sec. 47*n*.

Adjournment, formerly—see sec. 33, *ante*, under JURISDICTION.

§ 49. In the determination of causes, all decisions of the Supreme Court in bank, or in departments, shall be given in writing, and the grounds of the decision shall be stated.

Const. Cal. art. 6, sec. 2.

§ 50. The jurisdiction of the Supreme Court is of two kinds:

1. Original; and,
2. Appellate.

U. S. Supreme Ct., writ of error from—11 Cal. 176; *Belcher v. Chambers*, 53 Cal. 635.

Facts—not investigated, 26 Cal. 273.

Correction—of minutes, 36 Cal. 328; of records of lower court, 31 Cal. 167.

Final judgment—37 Cal. 438.

Original jurisdiction—former lack of, notes to sec. 51.

§ 51. In the exercise of its original jurisdiction the Supreme Court shall have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus; and it shall also have power to issue all other writs necessary and proper to the complete exercise of its appellate jurisdiction.

Const. Cal. art. 6, sec. 4.

See *Hyatt v. Allen*, March 23rd, 1880, and notes to sec. 33, *ante*, on jurisdiction.

Original jurisdiction—extent of, 1 Cal. 85, 144, 347; 7 Cal. 140; 14 Cal. 62; 21 Cal. 169; *Hyatt v. Allen*, *supra*.

Mandamus—secs. 54, 76, 165, 1064 *et seq.*, 1108 to 1110.

Certiorari—secs. 54, 76, 165, 1067 *et seq.*, 1108 to 1110.

Prohibition—secs. 54, 76, 165, 1102 *et seq.*, 1108 to 1110.

Habeas corpus—secs. 54, 76, 165; 1 Cal. 85, 144.

Appellate powers—sec. 44; 1 Cal. 85, 89, 144.

"All other writs"—25 Cal. 28, 96; 28 Cal. 71; *Hyatt v. Allen*, *supra*.

Writ of error—sec. 129ⁿ, (Supreme Ct. rule 26); 1 Cal. 85; 3 Cal. 27; 4 Cal. 208; 5 Cal. 190; 8 Cal. 297; 52 Cal. 220.

Injunction—secs. 54, 76, 165, 356, 525 *et seq.*, 745, 1241.

Procedendo—sec. 129, Supreme Ct. rule 28.

Writs, certain, abolished—*scire facias* and *quo warranto*, sec. 802 (but as to latter, see sec. 76, subd. 5); *ne exeat*, 49 Cal. 466, and sec. 478.

Writ—defined, sec. 17; seal, sec. 153; issuance, sec. 54; service by telegraph, sec. 1017.

§ 52. The Supreme Court shall have appellate jurisdiction:

1. In all cases in equity, except such as arise in Justices' Courts.

2. In all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

3. In all cases of forcible entry and detainer, proceedings in insolvency, actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law.

4. In all special proceedings.

5. In all criminal cases prosecuted by indictment, or

information, in a court of record, on questions of law alone.

Const. Cal. art. 6, sec. 4.

Appeals in general—sec. 936 *et seq.*

Appeals to Supreme Court—sec. 963 *et seq.*

Appellate jurisdiction—1 Cal. 144; 8 Cal. 297; 10 Cal. 249; 31 Cal. 82; 34 Cal. 29.

Jurisdiction generally—see notes to sec. 33, *ante.*

SUBDIVISION 1. Generally—see sec. 76, subd. 1. Added jurisdiction of Justices' Courts, see sec. 113.

SUBDIVISION 2. See sec. 76, subd. 3.

SUBDIVISION 3. See sec. 76, subd. 4; Divorce, 10 Cal. 251.

SUBDIVISION 4. Special proceedings—Extraordinary writs, secs. 1067-1110. Forcible Entry and Detainer, subd. 3. Liens, enforcement of, secs. 1180-1206. Insolvency, sec. 1822; 6 Cal. 231; 12 Cal. 281; 28 Cal. 117. Eminent Domain, secs. 1237-1263; 29 Cal. 112; 42 Cal. 35, 68. Arbitration, secs. 1281-1290. Award, appeal from, 2 Cal. 78; 42 Cal. 125.

SUBDIVISION 5. Indictable offenses—see Penal Code, sec. 888. Information—see Const. Cal. art. 1, sec. 8. Court of record—see sec. 34. Felony—alone appealable, formerly, 5 Cal. 295; 7 Cal. 140, 166; 9 Cal. 86; 16 Cal. 187; 20 Cal. 117; 29 Cal. 460; 30 Cal. 98; 35 Cal. 390; 53 Cal. 427.

§ 53. The Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court shall be given in writing; and in giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken.

Affirming judgment—see sec. 955; 15 Cal. 324; 16 Cal. 207; 24 Cal. 52.

Amendments—Sec. 473; 7 Cal. 447; 8 Cal. 135.

Appeal, effect of—generally, secs. 949, 1049; as to new trial, 40 Cal. 280.

Correcting judgments—7 Cal. 447; 20 Cal. 415; Reed *v.* Allison, April 15th, 1880; also, see AMENDMENTS.

Costs on modification—sec. 1027.

Death—pending appeal, sec. 129, (Supreme Ct. Rule 14); sec. 335; 20 Cal. 68; S. & L. Soc. *v.* Gibb, 21 Cal. 609; 35 Cal. 463; 40 Cal. 96; 49 Cal. 149.

Decision—requirements of, see sec. 49; limits of, 5 Cal. 96; 30 Cal. 223; terms of, 7 Cal. 447; time for filing, Const. Cal. art. 6, sec. 24; paramount when, 20 Cal. 415; 45 Cal. 57. See also, DICTUM, LAW OF THE CASE, OPINION, STARE DECISIS.

Dictum—9 Cal. 236, 615; 20 Cal. 276; 30 Cal. 103; 39 Cal. 223; 53 Cal. 608.

Discretion—interference for abuse of, only. See sec. 657, GENERAL NOTE; also, subd. 1 and subd. 6, notes, in same section.

Dismissal of appeal—sec. 129, (Supreme Ct. Rules 3 and 4); secs. 954, 955; 8 Cal. 347; 15 Cal. 324; 16 Cal. 207; 23 Cal. 636; 24 Cal. 52, 166; 28

Cal. 88; 24 Cal. 518; 35 Cal. 216, 463; 36 Cal. 127; 38 Cal. 286; 39 Cal. 666; 40 Cal. 93, 101, 278; 42 Cal. 513, 629; 43 Cal. 24, 27, 54; 45 Cal. 18.

Errors—sec. 657, subd. 7. See also, REVERSING JUDGMENT, DISMISSAL OF APPEAL.

Evidence—conflicting, see sec. 657, subd. 6.

Excess—in judgment, remitting, 12 Cal. 479; 14 Cal. 419; 16 Cal. 434; 17 Cal. 618; 25 Cal. 187; 29 Cal. 165; 46 Cal. 205. See also, note to sec. 657, subd. 5.

Intendments—all in favor of proceedings below. See sec. 475 and sec. 1963, subds. 15, 16, 17, 18, 33; 1 Cal. 32, 42, 115, 139, 183, 374, 386, 405, 453; 3 Cal. 185, 426, 456; 4 Cal. 286, 331; 5 Cal. 321, 409; 6 Cal. 478; 7 Cal. 54, 279, 32; 9 Cal. 210, 231, 426; 10 Cal. 49, 178; 17 Cal. 371; 22 Cal. 51; 24 Cal. 378, 385; 27 Cal. 500; 31 Cal. 233; 33 Cal. 512; 34 Cal. 391; 36 Cal. 696; 39 Cal. 45; 42 Cal. 313, 439; 43 Cal. 389; 44 Cal. 117, 370; 45 Cal. 34, 462; 49 Cal. 62; 50 Cal. 419; Phillips v. Lowery, February 7th, 1880. *Contra*, generally, see RECORD, as confining review, 9 Cal. 564; 17 Cal. 585; 50 Cal. 399; 51 Cal. 635; as to inferior courts, see sec. 33n; 6 Cal. 654; 7 Cal. 64; 12 Cal. 22; 15 Cal. 296, 301; 23 Cal. 403; 33 Cal. 318; Ex parte Kearney, May 27th, 1880.

Judgment—assumptions in support of, see INTENDMENTS, conclusive, how far, sec. 1908; affirming, modifying, reversing, etc., see those heads.

Law of the case—2 Cal. 374; 6 Cal. 687; 7 Cal. 592; 15 Cal. 83; 16 Cal. 81; 20 Cal. 45, 415; 21 Cal. 487, 551; 23 Cal. 383; 25 Cal. 121; 37 Cal. 105, 521; 38 Cal. 667; 43 Cal. 323, 485; 44 Cal. 494; 47 Cal. 632; 48 Cal. 543, 639; 51 Cal. 62; Belcher v. Chambers, 53 Cal. 635; Thompson v. Felton, May 7th, 1880, per Thornton, J.

Modifying judgment—sec. 957; 2 Cal. 24, 81; 4 Cal. 125; 6 Cal. 21, 201; 7 Cal. 148; 16 Cal. 434; 17 Cal. 618; 25 Cal. 187; 26 Cal. 278; 27 Cal. 104, 497; 29 Cal. 165; 33 Cal. 134; 39 Cal. 516; 43 Cal. 136; 45 Cal. 562; 46 Cal. 205, 27; 49 Cal. 293; 53 Cal. 653; Dent v. Holbrook, Feb. 6th, 1880; Kelly v. McKibben, Feb. 21st, 1880; Hib. S. & L. Soc. v. Fella, March 25th, 1880.

New trial—effect of decision as to, 7 Cal. 443; 9 Cal. 16; 23 Cal. 549; 28 Cal. 303; 41 Cal. 627; 43 Cal. 23.

Opinions—13 Cal. 24. See also, DECISION, DICTUM, REASONS, and sec. 129; Supreme Ct. Rules 19, 21; Const. Cal. art. 6, sec. 17.

Overruling—former judgment, 3 Cal. 451; 8 Cal. 630; 10 Cal. 282; 15 Cal. 697; 42 Cal. 416; Houghton v. Austin, 47 Cal. 667.

Pendency of action—as to appeal, sec. 1049.

Points—raising below, 27 Cal. 500. And see RECORD, as confining review. But *contra*, see 18 Cal. 525; 25 Cal. 598.

Reasons—See OPINIONS, also sec. 49; in court below, 3 Cal. 456; 10 Cal. 178; 39 Cal. 435; 48 Cal. 535.

Presumptions—as to jurisdiction, sec. 33n; as to regularity of proceedings, see INTENDMENTS.

Record—as confining review, 2 Cal. 132; 5 Cal. 96; 15 Cal. 494; 20 Cal. 106; 25 Cal. 145; 30 Cal. 103, 223; 33 Cal. 698; 45 Cal. 196; 53 Cal. 399, 420, 682; Conner v. Bludworth, April 26th, 1880.

Records—verity of, see INTENDMENTS; also, Hahn v. Kelly, 34 Cal. 31.

Relief—sec. 957.

Remanding—for further proceedings, 7 Cal. 447; 22 Cal. 416; 28 Cal. 303; 43 Cal. 23; Hib. S. & L. Soc. v. Fella, March 25th, 1880.

Remittitur—sec. 958.

Res adjudicata—sec. 1908; also see LAW OF THE CASE.

Restoring appeal—45 Cal. 18.

Reversing judgment—1 Cal. 359, 479; 7 Cal. 443, 447; 9 Cal. 16; 10 Cal. 545; 11 Cal. 258; 14 Cal. 248; 15 Cal. 286; 20 Cal. 522; 23 Cal. 478, 549; 25 Cal. 174; 28 Cal. 20; 30 Cal. 462, 488; 48 Cal. 639; 51 Cal. 511. Also, see sec. 957.

Review, bill of—12 Cal. 99; 34 Cal. 76; 41 Cal. 320; extent of, generally, see RECORD as confining review; on appeal from judgment, sec. 956.

Rules—sec. 129.

Stare decisis—see LAW OF THE CASE; 2 Cal. 374; 5 Cal. 403; 6 Cal. 687; 7 Cal. 592; 21 Cal. 305; 22 Cal. 109, 604; 29 Cal. 222; *Hihn v. Curtis*, 31 Cal. 400; 39 Cal. 223; 42 Cal. 488; 48 Cal. 493, 523. *Contra*, see OVERRULING FORMER JUDGMENT.

Stipulation—sec. 283, note to subd. 1.

§ 54. The concurrence of three Justices of the Supreme Court is necessary for the issuance of any writ, or the transaction of any business, except such as can be done at chambers; *provided*, that each of the justices shall have power to issue writs of habeas corpus to any part of the State upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or any department, or judge thereof, or before any Superior Court in the State, or any judge thereof.

See Const. Cal. art. 6, sec. 4.

Concurrence—sec. 43a.

Business at chambers—sec. 165.

Single justice—40 Cal. 483.

HABEAS CORPUS.

See U. S. Const. art. 8, Amdts., and Const. Cal. art. 2, secs. 5, 6.

Jurisdiction, as to—secs. 33a, and 51.

Generally—Penal Code, sec. 1473 *et seq.*, sec. 1492 *et seq.* (also, sec. 1268 *et seq.*); 1 Cal. 9, 345; 2 Cal. 429; 5 Cal. 585; 7 Cal. 175, 182; 19 Cal. 131; 22 Cal. 181; 28 Cal. 372; 28 Cal. 251; 31 Cal. 619; 35 Cal. 100; 40 Cal. 627; 41 Cal. 29, 212; 42 Cal. 199, 254; 43 Cal. 455; 44 Cal. 32, 581; 46 Cal. 112; 47 Cal. 605; 49 Cal. 159, 467; 51 Cal. 317, 375; 53 Cal. 410; *Ex parte Hung Lin*, January 13th, 1880; *Ex parte Ellis*, March 1st, 1880; *Ex parte Clarke*, March 23rd, 1880; *Ex parte Cohn*, May 19th, 1880; *Ex parte Kearney*, May 27th, 1880.

§ 55. All records, books, papers, causes, actions, proceedings, and appeals lodged, deposited, or pending in the Supreme Court abolished by the Constitution, are transferred to the Supreme Court herein provided for, which has the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein, or, in cases of appeal, appealed thereto.

Const. Cal. art. 22, sec. 3.

People v. Colby, February 19th, 1880.

§ 56. In all cases of appeal transferred to the Supreme Court, its judgments shall be remitted to the Superior Courts of the counties, or cities and counties, from which the appeals were taken respectively, with the same force and effect as if said cases had been appealed to the Supreme Court from such Superior Courts.

See sec. 55, note.

CHAPTER IV.

SUPERIOR COURTS.

- 65. Judges and elections.
- 66. Superior Courts of two or more judges.
- 67. Superior Court of the City and County of San Francisco.
- 68. Terms of office.
- 69. Computation of years of office.
- 70. Vacancies.
- 71. Superior Courts by judges of other counties.
- 72. Judges *pro tempore*.
- 73. Sessions.
- 74. Adjournments.
- 75. Jurisdiction of two kinds,
- 76. Original jurisdiction.
- 77. Appellate jurisdiction.
- 78. Process.
- 79. Transfer of books, papers, and actions.

§ 65. There shall be in each of the organized counties, or cities and counties of the State, a Superior Court, for each of which one judge, and for some of which two or more judges, as hereinafter in subsequent sections specially provided, shall be elected by the qualified electors of the county, or city and county, at the general State elections next preceding the expiration of the terms of office of their predecessors respectively; *provided*, that in and for the counties of Yuba and Sutter combined, only one Superior Judge shall be elected, who shall hold the Superior Courts of both said counties, and in accordance with such rules for the dispatch of business in both said counties as he may adopt.

Const. Cal. art. 6, sec. 6.

§ 66. In each of the counties of Alameda, Los Angeles, Sacramento, San Joaquin, Santa Clara, and Sonoma, there shall be elected two Judges of the Superior Court; and in each of said counties, and in any county, or city and county, other than the city and county of San Francisco, in which there shall be more than one Judge of the Superior Court, the judges of such court may hold as many sessions of said court at the same time as there are judges thereof, and shall apportion the business among themselves as equally as may be.

Const. Cal. art. 6, secs. 6, 7.

§ 67. In the city and county of San Francisco there shall be elected twelve Judges of the Superior Court, any one or more of whom may hold court; and there may be as many sessions of said court at the same time as there are judges thereof. The said judges shall choose from their own number a Presiding Judge, who may at any time be removed and another chosen in his place, by a vote of any seven of them. The Presiding Judge shall distribute the business of the court among the judges thereof, and prescribe the order of business. The judgments, orders, and proceedings of any session of the Superior Court, held by any one or more of the judges of said court, shall be equally effective as if all the judges of said court presided at such session.

Const. Cal. art. 6, sec. 6.

Jurisdiction—secs. 33*n*, 75, 76, 77.

Process—sec. 78.

Co-ordinate jurisdiction—sec. 33*n*.

§ 68. The term of office of Judges of the Superior Court shall be six years from and after the first Monday of January next succeeding their election; *provided*, that the twelve Judges of the Superior Court elected in the city and county of San Francisco at the general State election of eighteen hundred and seventy-nine shall have so classified, or shall so classify themselves, by lot, that four of them shall go out of office at the end of one year, four of them at the end of three years, and four of them at the end of five years from the first Monday of January, eighteen hundred and eighty; and the entry of such classification shall have been, or shall be, made in the minutes of the court, signed by them, and a duplicate thereof filed in the office of the Secretary of State; *and provided further*, that all the other Superior Judges elected at the general State election of eighteen hundred and seventy-nine shall go out of office at the end of five years from the first Monday of January, eighteen hundred and eighty.

Const. Cal. art. 6, sec. 6.

§ 69. The years during which a Judge of a Superior Court is to hold office are to be computed respectively from and including the first Monday of January of any one year to and excluding the first Monday of January of the next succeeding year.

Const. Cal. art. 6, sec. 6. See sec. 41, *ante*.

§ 70. If a vacancy occur in the office of Judge of a Superior Court, the Governor shall appoint an eligible person to hold the office until the election and qualifica-

tion of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Const. Cal. art. 6, sec. 6. See sec. 42, *ante*.

Election to fill vacancy—11 Cal. 49, 77; 12 Cal. 378; 17 Cal. 11.

§ 71. A Judge of any Superior Court may hold the Superior Court in any county, at the request of the Judge or Judges of the Superior Court thereof, and, upon the request of the Governor, it shall be his duty to do so; and in either case the judge holding the court shall have the same power as a judge thereof.

Const. Cal. art. 6, sec. 8.

§ 72. Any cause in a Superior Court may be tried by a judge *pro tempore*, who must be a member of the bar admitted to practice before the Supreme Court, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and his action in the trial of such cause shall have the same effect as if he were a judge of such court. A judge *pro tempore* shall, before entering upon his duties in any cause, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of judge *pro tempore* in the cause wherein — is plaintiff, and — is defendant, according to the best of my ability."

Const. Cal. art. 6, sec. 8.

Admitted—before Supreme Court, must be, see sec. 157.

Agreed upon—see sec. 283, subd. 1.

§ 73. The Superior Courts shall be always open, (legal holidays and non-judicial days excepted) and they shall hold their sessions at the county seats of the several counties, or cities and counties, respectively. They shall hold regular sessions, commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof; *provided*, that in the city and county of San Francisco the Presiding Judge shall prescribe the times of holding such special sessions.

See Const. Cal. art. 6, sec. 5.

Always open—see same.

Holidays, etc.—see secs. 134, 135.

County seats—8 Cal. 382.

Sessions—abolition of terms, see **ALWAYS OPEN**, *supra*.

Terms—before Const. Cal. 1879; see **ADJOURNMENT**, sec. 33_n, also sec. 47_{3n} and 2 Cal. 582; 3 Cal. 254; 5 Cal. 407; 6 Cal. 21; 8 Cal. 521; 9 Cal. 17; 17 Cal. 314; 19 Cal. 127; 20 Cal. 628; 21 Cal. 273; 29 Cal. 72, 422; 33 Cal. 325; 34 Cal. 80; 35 Cal. 269; 36 Cal. 288; 37 Cal. 249; 40 Cal. 154; 42 Cal. 18, 398; 48 Cal. 90; 50 Cal. 648; *Stewart v. Mahoney Mg. Co.* Feb. 7th, 1880.

§ 74. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time.

See sec. 48.

Recesses—vacation, proceedings during, before Const. Cal. 1879, sec. 2_n; 20 Cal. 55; 44 Cal. 85; 46 Cal. 353.

§ 75. The jurisdiction of the Superior Courts is of two kinds:

1. Original; and,
2. Appellate.

See sec. 50, and 33_n.

§ 76. The Superior Courts shall have original jurisdiction:

1. In all cases in equity.
2. In all civil actions in which the subject of litigation is not capable of pecuniary estimation.
3. In all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars.
4. Of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, of all matters of probate, of divorce, and for annulment of marriage, and of all such special cases and proceedings as are not otherwise provided for.
5. In all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. Said courts shall have the power of naturalization, and to issue papers therefor. Said courts and their judges, or any of them, shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and of habeas corpus on petition by or on behalf of any person in actual custody, in their respective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days.

Const. Cal. art. 6, sec. 5.

Generally—see sec. 33_n, and **SUPERSEDED COURTS**.

Intendments—favoring jurisdiction, sec 53_n.

Federal jurisdiction—conflict with. see U. S. COURTS, sec. 33*n*.

SUBDIVISION 1. In general—45 Cal. 211, and sec. 33*n*; also, sec. 580, note on specific and preventive relief; further, see 4 Cal. 366; 5 Cal. 299; 7 Cal. 348; 8 Cal. 27, 35, 71, 270, 521; 9 Cal. 77, 614; 10 Cal. 577; 11 Cal. 76; 13 Cal. 596; 15 Cal. 134; 21 Cal. 76; 24 Cal. 491; 36 Cal. 290, 379, 639; 45 Cal. 211; 47 Cal. 481; 53 Cal. 129. **Injunction**—sec. 525 *et seq.* **Receivers**—sec. 564 *et seq.* **Foreclosure**—sec. 726 *et seq.* **Nuisance**—29 Cal. 429; see subd. 4. **Quieting title**—sec. 738, 739. **Partition**—sec. 752 *et seq.* **Alimony**—38 Cal. 267; see **DIVORCE**, subd. 4.

SUBDIVISION 2. Construction of—10 Cal. 249; 31 Cal. 86. **Divorce**—and annulment of marriage, see subd. 4.

SUBDIVISION 3. Money demands, etc., 1 Cal. 15; 2 Cal. 156; 4 Cal. 89; 5 Cal. 95; 9 Cal. 248; 12 Cal. 280; 14 Cal. 278; 15 Cal. 406; 18 Cal. 693; 23 Cal. 61. **Amount**—see sec. 33*n*; 10 Cal. 249; 11 Cal. 280; 18 Cal. 410; 23 Cal. 199; 28 Cal. 181; 34 Cal. 29; 45 Cal. 71; **COSTS NO PART**, 13 Cal. 29; 20 Cal. 90, 174; 23 Cal. 186; 27 Cal. 106; 30 Cal. 546. **Admiralty**—sec. 813 *et seq.*; 1 Cal. 487; 2 Cal. 308; 5 Cal. 268; 7 Cal. 408; 8 Cal. 422; 9 Cal. 697; 34 Cal. 679; 42 Cal. 229, 472; 50 Cal. 236. **Bankruptcy**—in general, sec. 33*n*. **Real property**—17 Cal. 67; 31 Cal. 140, 339; 38 Cal. 684; 39 Cal. 319; 47 Cal. 481. **Land department contests**—44 Cal. 351; 47 Cal. 461; 50 Cal. 82, 211; 51 Cal. 3; 52 Cal. 93; 53 Cal. 709, 711; *Chapman v. Quinn*, March 13th, 1880. **Tax, etc.**—24 Cal. 61; 28 Cal. 328; 30 Cal. 98; 34 Cal. 28, 580; 42 Cal. 35; 43 Cal. 494; **TOLL**, 18 Cal. 95; 52 Cal. 489; **MUNICIPAL FINE**, 30 Cal. 99; 33 Cal. 212; 36 Cal. 281.

SUBDIVISION 4. Forcible entry, etc.—see sec. 113, subd. 1, and 28 Cal. 119; 30 Cal. 576; 37 Cal. 162; 43 Cal. 300. **Insolvency**—12 Cal. 281; 29 Cal. 416. **Nuisance**—see **SPECIAL PROCEEDINGS**, sec. 52, subd. 4; before Const. 1879, see 4 Cal. 236. **Probate matters**—control of, before Const. Cal. 1879, see **SUPERSEDED COURTS**.

DIVORCE.

See **CIVIL CODE**, sec. 90, *et seq.*

Admissions—sec. 2079; 10 Cal. 527; 13 Cal. 87; 25 Cal. 589; 28 Cal. 601; 49 Cal. 90.

Alimony—5 Cal. 388; 35 Cal. 691; 38 Cal. 267.

Children—custody, etc., 14 Cal. 512; 45 Cal. 399.

Complaint—3 Cal. 322; 10 Cal. 249; 22 Cal. 635; *Haskell v. Haskell*, March 5th, 1880.

Defense—10 Cal. 250.

Grounds—9 Cal. 476; 14 Cal. 79, 459, 656; 19 Cal. 627; 20 Cal. 431; 22 Cal. 268; 32 Cal. 467; 37 Cal. 364; 42 Cal. 444; *Haskell v. Haskell*, March 5th, 1880.

Legitimacy—sec. 1963, subd. 31.

Marriage—proof of, sec. 1963, subd. 30; 17 Cal. 598; 47 Cal. 621.

Property—division of, 10 Cal. 224; 22 Cal. 633; 31 Cal. 33; 32 Cal. 493; 33 Cal. 355; 37 Cal. 364; 39 Cal. 161; 47 Cal. 64.

Trial—private, sec. 125.

Relief—sec. 580, 16 Cal. 378; 22 Cal. 633; 33 Cal. 355.

Review—49 Cal. 94.

Annulment of marriage—secs. 80-86.

Special proceedings—See sec. 52, subd. 4.

Special cases—see **SPECIAL PROCEEDINGS**, and 45 Cal. 199. Also, see **SUPERSEDED COURTS**, title County Courts, 6 Cal. 144; 19 Cal. 551; 23 Cal. 144; 31 Cal. 15; 45 Cal. 200; 48 Cal. 72.

SUBDIVISION 5. Criminal cases—*Felony*, see note to sec. 5; before Const. Cal. 1879, see 32 Cal. 140; *Misdemeanor*, see Penal Code, sec. 17; *Transfer of Cases*, sec. 73.

Naturalization—5 Cal. 303; 39 Cal. 99.

Quo warranto—see sec. 802.

Other extraordinary writs—see sec. 51*n*, also, 4 Cal. 185; 7 Cal. 113; 3 Cal. 53; 26 Cal. 372, 383; 30 Cal. 246, 573; 47 Cal. 604; 49 Cal. 465.

Habeas corpus—see sec. 54.

Judicial days—secs. 133 to 135.

SUPERSEDED COURTS.

Const. Cal. art. 22, sec. 3.

District Courts—1 Cal. 379; 3 Cal. 219, 379, 389, 464; 4 Cal. 185, 235, 290, 32, 366; 5 Cal. 52, 117; 7 Cal. 348; 9 Cal. 20, 77, 608; 10 Cal. 483; 12 Cal. 43; 17 Cal. 314, 371; 21 Cal. 24, 166, 555; 24 Cal. 61, 90, 491; 26 Cal. 383; 28 Cal. 277; 29 Cal. 427; 30 Cal. 576; 32 Cal. 414; 33 Cal. 212, 485; 34 Cal. 32, 291; 35 Cal. 691; 36 Cal. 153, 193, 281, 552; 38 Cal. 85, 428; 39 Cal. 315; 40 Cal. 183; 44 Cal. 121; 45 Cal. 200; 47 Cal. 7, 109; 48 Cal. 29, 70, 85; 49 Cal. 51, 465; 51 Cal. 145; 52 Cal. 93, 499; 53 Cal. 267.

County Courts—5 Cal. 43, 52, 279; 6 Cal. 70, 143; 9 Cal. 85; 11 Cal. 49; 12 Cal. 394, 409; 13 Cal. 145; 14 Cal. 180; 15 Cal. 91; 19 Cal. 374, 551; 23 Cal. 144; 26 Cal. 651; 27 Cal. 65; 28 Cal. 118; 30 Cal. 573; 31 Cal. 11; 32 Cal. 49; 34 Cal. 414; 35 Cal. 107, 213; 36 Cal. 639; 37 Cal. 454; 39 Cal. 98, 570; 40 Cal. 36, 62; 41 Cal. 129; 42 Cal. 325; 43 Cal. 300, 312; 45 Cal. 200, 679; 46 Cal. 26; 48 Cal. 70; 50 Cal. 30; 52 Cal. 220; 53 Cal. 412.

Probate Courts—4 Cal. 310, 362; 5 Cal. 60, 297, 432, 437; 6 Cal. 621, 652, 66; 10 Cal. 110, 495; 12 Cal. 435; 15 Cal. 220; 18 Cal. 478, 499; 19 Cal. 188, 57; 20 Cal. 158, 288, 623; 22 Cal. 266; 23 Cal. 415, 427; 24 Cal. 114, 123, 187; 28 Cal. 182, 505; 29 Cal. 20; 33 Cal. 46; 34 Cal. 638; 35 Cal. 392, 502; 38 Cal. 58; 39 Cal. 306; 40 Cal. 456; 41 Cal. 202; 44 Cal. 121; 43 Cal. 366; 49 Cal. 469, 67; 50 Cal. 388; 51 Cal. 146, 431, 435, 563; 53 Cal. 16, 616.

§ 77. The Superior Courts shall have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law.

Const. Cal. art. 6, sec. 5; also, sec. 33*n*, *ante*.

Appeals to Superior Courts—see secs. 974-980.

§ 78. The process of the Superior Courts shall extend to all parts of the State; *provided*, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated.

Const. Cal. art. 6, sec. 5.

Process—5 Cal. 117; also, see Political Code, sec. 4175 *et seq.*; also, see sec. 17, subd. 9, and secs. 187, 473, 1056, of this Code.

Real property—commencing action; as to place of trial, see secs. 392, 396.

§ 79. All records, books, papers, causes, actions, proceedings, and appeals lodged, deposited, or pending in the District Court or Courts, County Court, Probate Court,

Municipal Criminal Court, or Municipal Court of Appeals, of, in, or for any county, or city and county, of the State, abolished by the Constitution, are transferred to the Superior Court of such county, or city and county, which has the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein, or, in cases of appeal, appealed thereto.

Const. Cal. art. 22, sec. 3.

See sec. 55; *People v. Colby*, Feb. 19th, 1880; *Ex parte Toland*, March 19th, 1890.

CHAPTER V.

JUSTICES' COURTS.

- ARTICLE I. OF JUSTICES' COURTS IN CITIES AND COUNTIES.
 II. OF JUSTICES' COURTS IN TOWNSHIPS.
 III. JUSTICES OF THE PEACE AND JUSTICES' COURTS IN GENERAL.

ARTICLE I.

JUSTICES' COURTS IN CITIES AND COUNTIES.

- § 85. Justices' Court and justices.
 86. Justices' Clerk.
 87. Sheriff and deputies.
 88. Offices and office hours.
 89. Actions.
 90. Reassignment and transfer of actions.
 91. Payment of fees.
 92. Certificates, transcripts, and other papers.
 93. Justices' docket.
 94. Territorial extent of jurisdiction.
 95. Practice and rules.
 96. Attorneys.
 97. Salaries.
 98. What justices successors of others.

§ 85. There shall be in every city and county of more than one hundred thousand population a Justices' Court, for which five Justices of the Peace shall be elected by the qualified electors of such city and county, at the general State election next preceding the expiration of the terms of office of their predecessors. Any one of said justices may hold court, and there may be as many sessions of said court at the same time as there are justices thereof. The said justices shall choose one of their number to be Presiding Justice, who may at any time be removed and another appointed in his place by a vote of a majority of them; *provided*, that in case of the temporary absence or disability of the Presiding Justice, any one of the other justices, to be designated by the Presiding Justice, may act as Presiding Justice during such absence or disability.

Const. Cal. art. 6, sec. 11.

Compare throughout this article, Consolidation Act, containing act of March 26th, 1863, organizing San Francisco Justices' Court, with amendments thereto.

§ 86. The Supervisors of such city and county shall appoint a Justice's Clerk, on the written nomination and recommendation of said justices, or a majority of them, who shall hold office for two years, and until his successor is in like manner appointed and qualified. Said Justices' Clerk shall take the constitutional oath of office, and give bond in the sum of ten thousand dollars for the faithful discharge of the duties of his office, and in the same manner as is or may be required of other officers of such city and county. A new or additional bond may be required by the Supervisors of such city and county, and in such amount as may be fixed by said Supervisors, whenever they may deem it necessary. The Justices' Clerk shall have authority to appoint two deputy clerks, for whose acts he shall be responsible on his official bond, the said deputy clerks to hold office during the pleasure of said Clerk. Said Justices' Clerk and deputy shall have authority to administer oaths, and take and certify affidavits in any action, suit, or proceeding in said Justices' Court.

Clerks generally—see sec. 262.

§ 87. The Sheriff of such city and county shall be *ex-officio* an officer of said court, and it shall be his duty to serve or execute, or cause to be served and executed, each and every process, writ, or order that may be issued by said Justice's Court; *provided*, that a summons issued from said court may be served and returned as provided in section eight hundred and forty-nine of this Code; and that subpoenas may be issued by the Justices' Clerk, and served as provided in section one thousand nine hundred and eighty-seven and one thousand nine hundred and eighty-eight of this Code. The said Sheriff may appoint, in addition to the other deputies allowed by law, three deputies, whose duty it shall be to assist said Sheriff in serving and executing the process, writs, and orders of the said Justice's Court. Said deputies shall receive a salary of one hundred and twenty-five dollars per month each, payable monthly out of the city and county treasury, and out of the special fee fund, after being first allowed and audited as other demands are by law required to be audited and allowed. One of said deputies shall remain in attendance during the sessions of said court, and at such other times as the said court or the Presiding Justice thereof may order and direct, for the purpose of attending to such duties as may be imposed on said Sheriff or said deputies; as herein provided, or required by law. The said Sheriff shall be liable on his official bond for the

faithful performance of all duties required of him or any of his said deputies.

Sheriff generally—see sec. 262.

§ 88. The Supervisors of such city and county shall provide, in some convenient locality in the city and county, a suitable office or suite of offices for said Presiding Justice, Justices' Clerk, Deputy Clerk, and Deputy Sheriff, and offices suitable for holding sessions of said court, and separate from one another, for each of said Justices of the Peace, together with attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business; and if they are not provided, the court may direct the Sheriff to provide the same, and the expenses incurred, certified by the justices to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof. The said Justices, Justices' Clerk, and Deputy Clerk shall be in attendance at their respective offices, for the dispatch of official business, daily, from the hour of eight o'clock A. M. until five o'clock P. M.

§ 89. All actions, suits, and proceedings in such city and county whereof Justices of the Peace or Justices' Courts have jurisdiction, except those cases of concurrent jurisdiction that may be commenced in some other court, shall be entitled, "In the Justices' Court of the City and County of _____" (inserting the name of the city and county) and commenced and prosecuted in said Justices' Court, which shall be always open. The original process shall be returnable, and the parties summoned required to appear before the Presiding Justice, or before one of the other Justices of the Peace, to be designated by the Presiding Justice, at his office; but all complaints, answers, and other pleadings and papers, required to be filed, shall be filed, and a record of all such actions, suits, and proceedings made and kept in the Clerk's office aforesaid; and the Presiding Justice and each of the other justices shall have power, jurisdiction, and authority to hear, try, and determine any action, suit, or proceeding so commenced, and which shall have been made returnable before him, or may be assigned or transferred to him, or any motion, application, or issue therein, (subject to the constitutional right of trial by jury) and to make any necessary and proper orders therein.

Concurrent jurisdiction—see sec. 113.

§ 90. In case of sickness or disability or absence of a Justice of the Peace (on the return of a summons or at

the time appointed for trial) to whom a cause has been assigned, the Presiding Justice shall reassign the cause to some other justice, who shall proceed with the trial and disposition of said cause in the same manner as if originally assigned to him; and if, at any time before the trial of a cause or matter returnable or pending before any of said justices, either party shall object to having the cause or matter tried before such justice, on the ground that such justice is a material witness for either party, or on the ground of the interest, prejudice, or bias of such justice, and such objection be made to appear in the manner prescribed by section eight hundred and thirty-three of this Code, the said justice shall suspend proceedings, and the Presiding Justice, on motion and production before him of the affidavit and proofs, shall order the transfer of the cause or matter for trial before some other justice, to be designated by him. The Presiding Justice may, in like manner, assign or transfer any contested motion, application, or issue in law, arising in any cause returnable or pending before him or any other justice, to some other justice; and the said justice, to whom any cause, matter, motion, application, or issue shall be so as aforesaid assigned or transferred, shall have power, jurisdiction, and authority to hear, try, and determine the same accordingly.

§ 91. All legal process of every kind in actions, suits, or proceedings in said Justices' Court, for the issue or service of which any fee is or may be allowed by law, shall be issued by the said Justices' Clerk upon the order of the Presiding Justice, or upon the order of one of the Justices of the Peace, acting as Presiding Justice, as in this article provided; and the fees for issuance and service of all such process, and all other fees which are allowed by law for any official services of justices, justices' clerks, or sheriff, shall be exacted and paid in advance into the hands of said Clerk, and be by him daily, or weekly, or monthly, as the Supervisors may require, and before his salary shall be allowed, accounted for in detail, under oath, and paid into the treasury of such city and county as part of the special fee fund thereof; *provided*, that such payment in advance shall not be exacted from parties who may prove to the satisfaction of the Presiding Justice that they have a good cause of action, and that they are not of sufficient pecuniary ability to pay the legal fees; and no judgment shall be rendered in any action before said Justices' Court, or any of said justices, until the fees allowed therefor, and all fees for previous services

therein, which are destined to be paid into the treasury, shall have been paid, except in cases of poor persons, as hereinbefore provided.

Const. Cal. art. 6, sec. 15.

Fees—change of, 14 Cal. 12; 26 Cal. 18.

§ 92. Cases which by the provisions of law are required to be certified to the Superior Court, by reason of involving the question of title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, shall be so certified by the Presiding Justice and Justices' Clerk; and for that purpose, if such question shall arise on the trial, while the case is pending before one of the other justices, such justice shall certify the same to the Presiding Justice. All abstracts and transcripts of judgments and proceedings in said court, or in any of the dockets or registers of or deposited in said court, shall be given and certified from any of such dockets or registers, and signed by the Presiding Justice and Clerk, and shall have the same force and effect as abstracts and transcripts of Justices of the Peace in other cases. Appeals from judgments rendered in said court shall be taken and perfected in the manner prescribed by law; but the notice of appeal, and all the papers required to be filed to perfect it, shall be filed with the Justices' Clerk. Statements on appeal shall be settled by the justice who tried the cause. Sureties on appeal, or on any bond, or undertaking given in any cause or proceeding in said court, when required to justify, may justify before any one of the justices.

Transfer—to Superior Court, see sec. 838.

Appeals—see sec. 974, *et seq.*

§ 93. In a suitable book, strongly bound, the Justices' Clerk shall keep a permanent record of all actions, proceedings, and judgments commenced, had, or rendered in said Justices' Court, which book shall be a public record, and be known as the "Justices' Docket," in which docket the Clerk shall make the same entries as are provided for in section nine hundred and eleven of this Code, and which said docket and entries therein shall have the same force and effect as is provided by law in reference to dockets of Justices of the Peace. To enable the Clerk to make up such docket, each of the justices shall keep minutes of his proceedings in every cause returnable before or assigned or transferred to him for trial or hearing; and upon judgment or other disposition of a cause, such justice shall immediately certify and return the said minutes, to-

gether with all pleadings and papers in said cause, to the Clerk's office, who shall immediately thereupon file the same and make the proper entries under the title of the action in the docket aforesaid.

Docket—generally, sec. 911 *et seq.*; effect of, sec. 912.

§ 94. The jurisdiction of the Justices' Court of such city and county extends to the limits of the city and county, and its process may be served in any part thereof.

Jurisdiction—character of, secs. 33n, 925.

Process—see sec. 78n.

§ 95. The Justices' Court and the Justices of the Peace of every such city and county shall be governed in their proceedings by the provisions of law regulating proceedings before Justices of the Peace, so far as such provisions are not altered or modified in this article, and the same are or can be made applicable in the several cases arising before them. The Justices' Courts of such city and county shall have power to make rules not inconsistent with the Constitution and laws for the government of such Justices' Court and the officers thereof: but such rules shall not be in force until thirty days after their publication; and no rules shall be made imposing any tax or charge on any legal proceeding, or giving any allowance to any justice or officer for services.

Provisions—applicable, secs. 832-925.

Rules—of courts generally, sec. 129.

§ 96. It shall not be lawful for any Justice of the Peace, Justices' Clerk, or Sheriff of any such city and county, or any of their deputies, to appear or advocate, or in any manner act as attorney, counsel, or agent for any party or person in any cause, or in relation to any demand, account, or claim pending, or to be sued or prosecuted before said court or justices, or either of them; nor shall any person other than an attorney-at-law, duly admitted to practice in courts of record, be permitted to appear as attorney or agent for any party in any cause or proceeding before said Justice's Court, or any of said justices, unless he produce a sufficient power of attorney to that effect, duly executed and acknowledged before some officer authorized by law to take acknowledgments of deeds, which power of attorney, or a copy thereof, duly certified by one of the justices, (who on inspection of the original, and being satisfied of its genuineness, shall certify such copy) shall be filed among the papers in such cause or proceeding.

See sec. 171.

Justice of the Peace—eligibility, sec. 159.

Judicial officers—disqualifications, secs. 170, 171, 172.

Ministerial officers—generally, sec. 262.

Attorneys—sec. 275 *et seq.*

§ 97. The Justices of the Peace, and Justices' Clerk, and his deputy, shall receive for their official services the following salaries, and no other or further compensation, payable monthly, out of the city and county treasury, and out of the special fee fund thereof, after being first allowed and audited as other similar demands are by law required to be allowed and audited: To the Presiding Justice, twenty-seven hundred dollars per annum; to the other Justices of the Peace and the Justices' Clerk, each, twenty-four hundred dollars per annum; to the Deputy of the Justices' Clerk, twelve hundred dollars per annum.

§ 98. The Justices of the Peace elected in any such city and county at the general election of eighteen hundred and seventy-nine, or persons appointed to fill their places, are successors of the justices of the peace of such city and county who held office at the time of such election; and all records, registers, dockets, books, papers, causes, actions, and proceedings lodged, deposited, or pending before the Justices' Court or any justice of any such city and county, are transferred to the Justices' Court of such city and county herein provided for, which shall have the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein.

Transfer—see secs. 55, 79.

ARTICLE II.

JUSTICES' COURTS IN TOWNSHIPS.

- § 103. Justices' Courts and justices.
- 104. Courts, where held.
- 105. What justice may hold court for another.
- 106. Territorial extent of civil jurisdiction.
- 107. What justices successors of others.

§ 103. There shall be at least one Justices' Court in each of the townships of the State, for which one Justice of the Peace shall be elected by the qualified electors of the township at the general State election next preceding the expiration of the term of office of his predecessor; *provided*, that in any county where in the opinion of the Board of Supervisors the public convenience requires it, the said board may, by order, provide that two Justices' Courts

may be established in any township, designating the same in such order, and in such case one Justice of the Peace shall be elected in the manner herein provided for each of said courts. In every city having ten thousand and not more than twenty thousand inhabitants there shall be one Justice of the Peace; and in every city having twenty thousand and not more than one hundred thousand inhabitants, two Justices of the Peace, to be elected in like manner by the electors of such cities respectively. No person shall be eligible to the office of Justice of the Peace in any city having over ten thousand inhabitants who has not been admitted to practice law in a court of record; and no Justice of the Peace shall be permitted to practice law before any other Justice of the Peace in the city or county in which he resides, or to have a partner engaged in the practice of law in any Justices' Court in such city or county. Every Justice of the Peace in any city having over ten thousand inhabitants shall receive an annual salary of two thousand dollars per annum, and shall be provided by the city authorities with a suitable office in which to hold his court. All fees which are by law chargeable for services rendered by such Justices of the Peace in the cities aforesaid, shall be by them respectively collected, and on the first Monday in each month every such city Justice of the Peace shall make report, under oath, to the City Treasurer, of the amount of fees so by him collected, and pay the amount so reported into the city treasury, to the credit of the general fund thereof.

Admission to bar—as qualification, secs. 156, 157.

Disabilities—secs. 170, 171, 172.

§ 104. A Justice's Court may be held at any place selected by the justice holding the same, in the township for which he is elected or appointed; and such court shall be always open for the transaction of business.

Always open—see secs. 47, 73.

§ 105. A Justice of the Peace of any township may hold the court of any other Justice of the Peace of the same county, at his request, and while so acting shall be vested with the power of the justice for whom he so holds court, in which case the proper entry of the proceedings before the attending justice, subscribed by him, shall be made in the docket of the justice for whom he so holds the court.

See sec. 71.

§ 106. The civil jurisdiction of Justices' Courts extends to the limits of the townships in which they are held;

but mesne and final process of any Justices' Court in a county may be issued to and served in any part of the county.

See sec. 94.

§ 107. The Justices of the Peace elected in the townships at the general State election of eighteen hundred and seventy-nine, or persons appointed to fill their places, are successors of the justices of the peace of the townships, respectively, who held office at the time of such election; and, in case the townships of any county are hereafter changed or altered, the Board of Supervisors of such county shall make provision as to what justices shall be successors of the justices of townships so changed or altered.

ARTICLE III.

JUSTICES OF THE PEACE AND JUSTICES' COURTS IN GENERAL.

- § 110. Terms of office.
- § 111. Vacancies.
- § 112. Civil jurisdiction.
- § 113. Concurrent jurisdiction.
- § 114. Civil jurisdiction restricted.
- § 115. Criminal jurisdiction.

§ 110. The term of office of Justices of the Peace shall be two years from the first day of January next succeeding their election; *provided*, that all Justices of the Peace elected at the general State election of eighteen hundred and seventy-nine shall go out of office at the end of one year from the first day of January, eighteen hundred and eighty.

§ 111. If a vacancy occurs in the office of a Justice of the Peace, the Board of Supervisors of the county shall appoint an eligible person to hold the office for the remainder of the unexpired term.

§ 112. The Justices' Courts shall have civil jurisdiction:

1. In actions arising on contract for the recovery of money only if the sum claimed, exclusive of interest, does not amount to three hundred dollars;
2. In actions for damages for injury to the person, or for taking, detaining, or injuring personal property, or for injury to real property where no issue is raised by the verified answer of the defendant involving the title to or possession of the same, if the damage claimed do not amount to three hundred dollars;

3. In actions to recover the possession of personal property, if the value of such property does not amount to three hundred dollars;

4. In actions for a fine, penalty, or forfeiture, not amounting to three hundred dollars, given by statute, or the ordinance of an incorporated city and county, city, or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

5. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not amount to three hundred dollars, though the penalty may exceed that sum;

6. To take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars.

Generally—6 Cal. 19; 7 Cal. 244; 8 Cal. 77; 9 Cal. 85; 11 Cal. 280; 20 Cal. 282; 23 Cal. 86; 29 Cal. 313; 34 Cal. 321; 35 Cal. 269; 47 Cal. 131; 53 Cal. 48.

Limited jurisdiction—sec. 33*n*; sec. 114; sec. 925; 23 Cal. 402; 33 Cal. 218; 34 Cal. 326; 35 Cal. 273.

SUBDIVISION 1. Contract—10 Cal. 372. Sum claimed—see note on AMOUNT, to sec. 76, subd. 3; 5 Cal. 230, 331; 6 Cal. 447; 7 Cal. 104; 8 Cal. 77; 23 Cal. 61; 29 Cal. 307; 30 Cal. 545; 40 Cal. 628. *Remitting damages*, 6 Cal. 414; 22 Cal. 466.

SUBDIVISION 2. Damages—see sec. 657, subd. 5, note. Personal property—*Water rights*, 5 Cal. 445. Real property—title or right of possession involved, compare sec. 113, subd. 1; and see secs. 76, subd. 3*n*, and 838; 17 Cal. 67; 38 Cal. 683; 39 Cal. 319; 53 Cal. 23. *Verified answer*—see sec. 446 *et seq.* Issue—see sec. 568. Amount—sec. 76, subd. 3*n*.

SUBDIVISION 3. Replevin—generally, secs. 473, 509 *et seq.*, 667.

SUBDIVISION 4. Legality of tax, etc.—see sec. 76, subd. 3, and notes; 24 Cal. 61. Forfeiture—statutory, 33 Cal. 212; 36 Cal. 281.

SUBDIVISION 6. Amount confessed—8 Cal. 77.

§ 113. The Justices' Courts shall have concurrent jurisdiction with the Superior Courts within their respective townships:

1. In actions of forcible entry and detainer, where the rental value of the property entered upon or unlawfully detained does not exceed twenty-five dollars per month, and the whole amount of damages claimed does not exceed two hundred dollars;

2. In actions to enforce and foreclose liens on personal property, where neither the amount of the liens nor the value of the property amounts to three hundred dollars.

Const. Cal. art. 6, sec. 11.

SUBDIVISION 1. Forcible entry and detainer—sec. 1159 *et seq.* Formerly—28 Cal. 118; 29 Cal. 662; 37 Cal. 162; 42 Cal. 324; 43 Cal. 304.

SUBDIVISION 2. Liens—for salaries and wages, secs. 1204, 1206. *Contra*—before Const. 1879, see 52 Cal. 407.

§ 114. Except as in the last preceding section provided, the jurisdiction of the Justices' Courts shall not, in any case, trench upon the jurisdiction of the several courts of record of the State, nor extend to any action or proceeding against ships, vessels, or boats, for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this State.

Const. Cal. art. 6, sec. 11.

Courts of Record—see sec. 34n.

Restricted jurisdiction—see sec. 112n.

Actions against vessels—sec. 813 *et seq.*; sec. 825.

§ 115. The Justices' Courts shall have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

1. Petit larceny;
2. Assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony;
3. Breaches of the peace, riots, routs, affrays, committing a willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

Criminal jurisdiction—*Deserting seamen*, 2 Cal. 144, 145. *In general*, 9 Cal. 85. *Misdemeanor*, 53 Cal. 412.

CHAPTER VI.
POLICE COURTS.

§ 121. Provided for in Political Code.

§ 121. Police Courts are established in incorporated cities and counties, cities, and towns, and their organization, jurisdiction, and powers provided for in the Political Code, part four.

34 Cal. 529.

CHAPTER VII.

GENERAL PROVISIONS RESPECTING
COURTS OF JUSTICE.

- ARTICLE I. PUBLICITY OF PROCEEDINGS.
 II. INCIDENTAL POWERS AND DUTIES OF COURTS.
 III. JUDICIAL DAYS.
 IV. PROCEEDINGS IN CASE OF ABSENCE OF JUDGE.
 V. PROVISIONS RESPECTING PLACES OF HOLDING
 COURTS.
 VI. SEALS OF COURTS.

ARTICLE I.

PUBLICITY OF PROCEEDINGS.

- § 124. Sittings, public.
 § 125. Sittings, when private.

§ 124. The sittings of every court of justice shall be public, except as provided in the next section.

U. S. Const. art. 6, sec. 1, amts.

§ 125. In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel; *provided*, that in any cause the court may, in the exercise of a sound discretion, during the examination of a witness, exclude any or all other witnesses in the cause.

Divorce—generally, sec. 76, subd. 4. Testimony kept secret, Political Code, sec. 1032.

Exclusion of witnesses—sec. 2043.

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

- § 128. Powers respecting conduct of proceedings.
 § 129. Courts of record may make rules.
 § 130. When rules take effect.

§ 128. Every court shall have power:

1. To preserve and enforce order in its immediate presence;

2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;

3. To provide for the orderly conduct of proceedings before it, or its officers;

4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;

5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this Code;

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties;

8. To amend and control its process and orders so as to make them conformable to law and justice.

See sec. 177.

Contempt—sec. 1209; also sec. 906 *et seq.*, and 47 Cal. 132; 53 Cal. 204; *Ex parte Cohn*, May 19th, 1880.

SUBDIVISION 3. Rules—sec. 129. Judicial officers—incidental powers, etc., secs. 176-179.

SUBDIVISION 5. *People v. Center*, March 1st, 1880.

SUBDIVISION 6. See sec. 1985 *et seq.*

SUBDIVISION 7. See secs. 2093-2097.

SUBDIVISION 8. See sec. 473.

§ 129. Every court of record may make rules not inconsistent with the laws of this State, for its own government and the government of its officers; but such rules shall neither impose any tax or charge upon any legal proceeding, nor give any allowance to any officer for services.

Powers of courts, judges, etc.—see secs. 128, 177.

Rules, generally—in *Supreme Court*, waiver, *Pickett v. Wallace*, February 8th, 1880; finality of decision, *Reed v. Allison*, April 5th, 1880; in *lower courts*, 5 Cal. 103; 6 Cal. 636; 18 Cal. 635; 29 Cal. 556; 31 Cal. 101; 32 Cal. 286.

SUPREME COURT RULES (JAN. 1880).

Admission of attorneys—rule 1; see sec. 275 *et seq.*

Argument—rule 18; 1 Cal. 197; 6 Cal. 636; 49 Cal. 374; and see BRIEFS AND POINTS AND AUTHORITIES.

Bank—hearing of causes in, rule 30; *rehearing*, generally, 7 Cal. 333; 11 Cal. 341; 14 Cal. 634; 24 Cal. 190; 25 Cal. 653; 30 Cal. 462; 39 Cal. 581; 43 Cal. 178; 46 Cal. 640; 48 Cal. 157; 50 Cal. 243; 52 Cal. 473.

Briefs—rule 2, subd. 5; no extension of time for, rule 2, subd. 6; generally, 49 Cal. 686; 50 Cal. 443; and see POINTS AND AUTHORITIES.

Calendar—rules 15 and 16; 10 Cal. 215; 43 Cal. 38, 43; 45 Cal. 270; 50 Cal. 468.

Certificate—as to applicant for license, rule 1; as to TRANSCRIPT, see that head.

Costs—on appeal, rule 24; 36 Cal. 127; and see secs. 1027, 1031, 1034; generally, see sec. 1021, *et seq.*; as to TRANSCRIPT, see that head.

Dismissal of appeal—*When transcript not filed in time*, rule 3; see 8 Cal. 300, 347; 25 Cal. 598; 45 Cal. 18; 47 Cal. 414; Hill v. Finnigan, March 13th, 1880; clerk's certificate on motion for, rule 4; see 43 Cal. 27; Frederick v. Tierney, Feb. 3rd, 1880; Pickett v. Wallace, Feb. 8th, 1880; Win-
derr. Hendrick, March 3rd, 1880; People v. Center, March 31st, 1880; copies of moving papers, rule 4, subd. 3. *On other grounds*, generally, sec. 954; and Reed v. Allison, April 5th, 1880; moving papers, rule 4, subd. 2 (copies of, subd. 3); when appeal too late, rule 4, subd. 4. *Certificate of*, rule 4, subd. 4. *On motion of respondent*, rule 25; see sec. 955, and 45 Cal. 270. *By stipulation*, rule 26. *For violation of requirements of transcript*, rule 6; generally, sec. 53n.

Examination—of applicants for license, rule 1.

Fee—for license, rule 1, subd. 2.

Hearing—at instance of either party, rule 25.

Motion—length of notice of, rule 20; for DISMISSAL OF APPEAL, see that head; generally, sec. 1003 *et seq.*

Objection—or exception to record, rule 13; 22 Cal. 42; 26 Cal. 263; 29 Cal. 614; 34 Cal. 518; 35 Cal. 127.

Opinions—recorded, rule 19; transmitted to court below, when, rule 2; generally, sec. 53n.

Paper—or document, manner of printing, rule 17; removal of, rule 2; inspection of, rule 27; People v. Center, March 1st, 1880.

Points—and authorities, printed; filing, rule 2, subd. 4; generally, 9 Cal. 124; 24 Cal. 157, 349; 25 Cal. 37; 28 Cal. 499; 51 Cal. 222; Martin v. Squires, No. 4938, Feb. 7th, 1876, not reported; Kelly v. Morgans, Feb. 2nd, 1880; Shay v. Lady B. Mg. Co., Feb. 11th, 1880; Mix v. Boothe, Feb. 13th, 1880.

Record—rule 10; diminution of, rule 13; see OBJECTION or EXCEPTION to Record.

Rehearing—See BANK.

Rejection—of applicant for license, rule 1, subd. 3.

Renewal—of application for license, rule 1, subd. 3.

Settlement—of bill of exceptions, etc., on death or disability of judge below, rule 29.

Statement of case—accompanying points and authorities, rule 2, subd. 4.

Substitution of representative—of party to appeal, rule 14; see sec. 11a., DEATH, pending appeal.

Transcript—*Arrangement*, chronological, rule 6. *Blank leaf*, rule 6. *Certificate*, of clerk below, rule 4; of opposing attorney, rule 9. *Costs*, on failure to certify, rule 9; of printing transcript and papers, rule 11. *Criminal causes*, time limited for filing, rule 2, subd. 8; how written or printed, rule 5, subd. 2. *Error*, or defect in, rule 12; People v. Center, March 1st, 1880; Hill v. Finnigan, March 13th, 1880. *Filing*, none when rules violated, rule 8; in *Criminal causes*, see that head. *Filing and serving*, time limited for, rule 2; In re 15th Av. Exn., Feb. 12th, 1880;

Hill v. Finnigan, March 13th, 1880; *Reed v. Allison*, April 5th, 1880; extension of time, rule 2, subd. 4; copies for, rule 2, subd. 7. *Index*, alphabetical, rule 6. *Printed*, how, rule 5; may be by clerk, rule 10. *Rules* violation of, see *Filing*, and *Douglas v. Fulda*, Feb. 9th, 1880. *Serving*, time for, see *Filing and serving*; proof of, rule 2, subd. 2; of copies of adverse attorney, rule 9. *Title*, chain of, in tabular form, rule 2, subd. 5; 49 Cal. 193; map or survey, rule 7.

Writs—prerogative, application for, rule 23, 45 Cal. 243; 47 Cal. 205; 50 Cal. 473; and see sec. 51; certiorari, issuance, rule 23; 40 Cal. 483.

§ 130. Rules adopted by the Supreme Court shall take effect sixty days, and rules adopted by Superior Courts, thirty days after their publication.

ARTICLE III.

JUDICIAL DAYS.

- § 133. Days on which courts, etc., may be held.
- § 134. Non-judicial days.
- § 135. Appointments on non-judicial days.

§ 133. Courts of justice may be held and judicial business transacted on any day, except as provided in the next section.

Courts—list of, sec. 33; JURISDICTION OF, sec. 33a.

§ 134. No court shall be open, nor shall any judicial business be transacted on Sunday, on the first day of January, on the twenty-second day of February, on the fourth day of July, on the twenty-fifth day of December, on a day in which an election is held throughout the State, or on a day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving, or holiday, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict;
2. To receive a verdict, or discharge a jury;
3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature; *provided*, that the Supreme Court shall always be open for the transaction of business; *and provided further*, that injunctions and writs of prohibition may be issued and served on any day.

Holidays—secs. 10, 11; also, secs. 12, 13.

Courts always open—secs. 47, 73.

Injunctions and writs of prohibition—issuance of, sec. 76, subd. 5.

§ 135. If any day mentioned in the last section happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day.

ARTICLE IV.

PROCEEDINGS IN CASE OF ABSENCE OF JUDGE.

§ 139. Adjournment for absence of judge.

§ 140. Adjournment till next regular session.

§ 139. If no Judge attend on the day appointed for the holding or sitting of a court, or on the day to which it may have been adjourned, before noon, the Sheriff or Clerk shall adjourn the same until the next day, at ten o'clock A. M., and if no Judge attend on that day, before noon, the Sheriff or Clerk shall adjourn the same until the following day at the same hour, and so on, from day to day for one week, unless the Judge, by written order, directs it to be adjourned to some day certain, fixed in said order, in which case it shall be so adjourned.

Arrival of judge—after noon, 24 Cal. 19.

Non-judicial day—sec. 135.

§ 140. If no Judge attend for one week, and no written order be made, as provided in the last section, the Sheriff or Clerk shall adjourn the session until the time appointed for the holding of the next regular session.

Premature adjournment—19 Cal. 644.

Sessions—see sec. 73a.

ARTICLE V.

PROVISIONS RESPECTING PLACES OF HOLDING COURTS.

§ 142. Change in certain cases of place of holding court.

§ 143. Parties to appear at place appointed.

§ 144. When Sheriff to provide court-rooms, etc.

§ 142. The Judge or judges authorized to hold or preside at a court appointed to be held at a particular place in a city and county, county, city, or town, may, by an order filed with the city and county or county clerk, and published as he or they may prescribe, direct that the court be held or continued at any other place in the city and county, county, city, or town than that appointed, when war, insurrection, pestilence, or other public calamity, or the danger thereof, or the destruction or danger of the building appointed for holding the court, may render it necessary; and may, in the same manner, revoke the order, and in his or their discretion, appoint another place in the same city and county, county, city, or town, for holding the court.

§ 143. When the court is held at a place appointed, as provided in the last section, every person held to appear at the court must appear at the place so appointed.

§ 144. If suitable rooms for holding the Superior Courts and the chambers of the judges of said courts be not provided in any city and county, or county, by the Supervisors thereof, together with the attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts, or the Judge or judges thereof, may direct the Sheriff of the city and county, or county, to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses incurred, certified by the Judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof.

ARTICLE VI.

SEALS OF COURTS.

- § 147. What courts shall have seals.
- § 148. Seal of Supreme Court.
- § 149. Seals of Superior Courts.
- § 150. Seals of Police Courts of cities and counties.
- § 151. Seals, how provided: private seals, when used.
- § 152. Clerk of court to keep seal.
- § 153. Seals of courts, to what documents affixed.

§ 147. Each of the following courts shall have a seal:

- 1st. The Supreme Court;
- 2nd. The Superior Courts;
- 3rd. The Police Court of every city and county.

Seal of court—*judicial notice* taken of, sec. 1875, subd. 4; *court commissioner* may provide official seal, sec. 259, subd. 5.

Seals—discussed, sec. 14*n*; seal not test of court of record, 52 Cal. 224, and see sec. 150.

§ 148. The seal used by the Supreme Court, abolished by the Constitution, shall be the seal of the Supreme Court herein provided for; but the said court may direct the Clerk of the Supreme Court to provide two duplicates of said seal, each of which shall be considered the same as and have the same force and effect as the original.

§ 149. The seals of the Superior Courts shall be circular, not less than one and three-fourths inches in diameter, and having in the center any word, words, or design adopted by the judges thereof, and the following inscription surrounding the same: "Superior Court, —, California," inserting the name of the county, or city and

county; *provided*, that the seal of any such court, which has been adopted previous to the passage of this act, shall be the seal of such court, until another be adopted.

See Act of March 31st, 1880, (Statutes 1880, p. 62), validating writs, process and certificates issued from Superior Courts before seal provided.

§ 150. The Police Court of every city and county may use any seal having upon it the inscription, "Police Court, —," (inserting the name of the city and county).

§ 151. Courts which have not the necessary seal provided, or the Judge or judges thereof, shall request the Supervisors of their respective counties, or cities and counties, to provide the same, and in case of their failure to do so, may order the Sheriff to provide the same, and the expense thereof shall be a charge against the county or city and county treasury, and paid out of the general fund thereof; and until such seal be provided, the Clerk of each court may use his private seal, whenever a seal is required.

§ 152. The clerks of the court shall keep the seal thereof.

§ 153. The seal of a court need not be affixed to any proceeding therein or document, except:

1. To a writ;
2. To the certificate of probate of a will, or of the appointment of an executor, administrator, or guardian;
3. To the authentication of a copy of a record, or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the Clerk.

Seals, generally—sec. 14, and note.

CODE CIV. PROC.—7.

TITLE II.

Judicial Officers.

- CHAPTER I. JUDICIAL OFFICERS IN GENERAL. §§ 156-161.
- II. POWERS AND DUTIES OF JUDGES AT CHAMBERS. §§ 165-166.
- III. DISQUALIFICATIONS OF JUDGES. §§ 170-172.
- IV. INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS. §§ 176-179.
- V. MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS. §§ 182-187.

CHAPTER I.

JUDICIAL OFFICERS IN GENERAL.

- § 156. Qualifications of Justices of Supreme Court.
§ 157. Qualifications of Superior Judges.
§ 158. Residence of Superior Judges.
§ 159. Residence and qualification of Justices of the Peace.
§ 160. Judges holding Superior Courts at request of Governor.
§ 161. Justices and Judges ineligible to other than judicial office.

§ 156. No person shall be eligible to the office of Chief or Associate Justice of the Supreme Court, unless he shall have been a citizen of the United States and a resident of this State for two years next preceding his election or appointment, nor unless he shall have been admitted to practice before the Supreme Court of the State.

Attorney—admitted before Supreme Court: otherwise (before Const. Cal. 1879, art. 6, sec. 23), see 32 Cal. 296.

§ 157. No person shall be eligible to the office of Judge of a Superior Court unless he shall have been a citizen of the United States and a resident of this State for two years next preceding his election or appointment, nor unless he shall have been admitted to practice before the Supreme Court of the State.

See sec. 156*n*.

§ 158. Each Judge of a Superior Court shall reside at the county seat of the county in which such court is held, or within three miles thereof, and within the county, except that in the counties of Yuba and Sutter the Judge may reside in either of said counties.

§ 159. Every Justice of the Peace shall reside in the city and county, or township, in which his court is held, and no person shall be eligible to the office of justice of the peace unless he shall have been a citizen of the United States and a resident of the city and county, or county, in which he is to serve for one year next preceding his election or appointment.

§ 160. If, by reason of sickness, absence, disability, or other cause, a regular session of the Superior Court cannot be held in any county by the Judge or judges thereof, or by a Superior Judge, requested by him or them to hold

such court, a certificate of that fact shall be transmitted by the Clerk thereof to the Governor, who may thereupon request some other Superior Judge to hold such court; and a Judge so holding a court, at the request of the Governor, shall be allowed his actual expenses in going to, returning from, and attending upon the business of such court, which shall be a charge against the treasury of the county where such court is held, and paid out of the general fund thereof.

See sec. 71.

Under Const. Cal. 1849—proper, 1 Cal. 379; 2 Cal. 207.

By consent—28 Cal. 472; 40 Cal. 468.

§ 161. The Justices of the Supreme Court and Judges of the Superior Courts shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected.

Const. Cal. art. 6, sec. 18.

CHAPTER II.

POWERS OF JUDGES AT CHAMBERS.

§ 165. Powers of Justices of Supreme Court at chambers.

§ 166. Powers of Superior Judges at chambers.

§ 165. The Justices of the Supreme Court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an *ex parte* application, except writs of mandamus, certiorari, and prohibition; and may, in their discretion, hear applications to discharge such orders and writs.

See sec. 176; also secs. 177, 178, 179.

§ 166. The Judge or Judges of a Superior Court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an *ex parte* application, and may, at chambers, hear and dispose of such orders and writs; and may also, at chambers, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate.

See sec. 155a.

Hours, etc., for official business—Political Code, sec. 4116.

Power at chambers, generally—10 Cal. 344; 17 Cal. 375; 27 Cal. 491; 31 Cal. 530, 565; 31 Cal. 173; 34 Cal. 331; 36 Cal. 24; 37 Cal. 15; 38 Cal. 439; 41 Cal. 84; 49 Cal. 239.

Motions for new trials—heard at chambers before change of 1860.

Probate matters—see sec. 1305.

CHAPTER III.

DISQUALIFICATIONS OF JUDGES.

§ 170. Disqualifications to sit or act.

§ 171. Certain judges not to practice law.

§ 172. No judicial officer to have partner practicing law.

§ 170. No Justice, Judge, or Justice of the Peace, shall sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;
2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law;
3. When he has been attorney or counsel for either party in the action or proceeding.

But the provisions of this section shall not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court.

Partiality—remedy for, 24 Cal. 34; 28 Cal. 492.

Disqualification—when none, 12 Cal. 523; 18 Cal. 185; vitiates judgment, 24 Cal. 76.

Change of venue—sec. 397, subd. 4; sec. 398.

SUBDIVISION 1. Party or interested—37 Cal. 190.

SUBDIVISION 2. Related—third degree, 23 Cal. 593; 24 Cal. 76; rules of law, Civil Code, secs. 1392, 1393.

SUBDIVISION 3. Judge—acting as attorney, sec. 171.

§ 171. No justice, or judge of a court of record, or county clerk, shall practice law in any court of this State, nor act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings, before any department of the State or general government, or courts of the United States, during his continuance in office; nor shall any justice of the peace practice law before any justice's court in the county in which he resides. [In effect March 14th, 1881.]

§ 172. No justice, judge, or other elective judicial officer, or court commissioner, shall have a partner acting as attorney or counsel in any court of this State.

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF
JUDICIAL OFFICERS.

- § 176. Powers of judges out of court.
- § 177. Powers of judicial officers as to conduct of proceedings.
- § 178. To punish for contempt.
- § 179. To take acknowledgments and affidavits.

§ 176. A Justice or Judge may exercise out of court all the powers expressly conferred upon a Justice or Judge, as contradistinguished from the court.

See secs. 165, 166, 179.

§ 177. Every judicial officer shall have power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;
2. To compel obedience to his lawful orders as provided in this Code;
3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this Code;
4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

See sec. 128.

§ 178. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this Code.

Contempt—generally, sec. 1209; in Justices' Courts, sec. 906.

§ 179. Each of the Justices of the Supreme Court, and Judges of the Superior Courts, shall have power in any part of the State, and every Justice of the Peace within his city and county, or county, and a Judge of a Police or inferior court within his city and county, city, or town, to take and certify:

1. The proof and acknowledgment of a conveyance of real property, or of any other written instrument;

2. The acknowledgment of satisfaction of a judgment of any court;

3. An affidavit or deposition to be used in this State.

SUBDIVISION 1. Real property—conveyance of, see sec. 1971.

SUBDIVISION 2. Satisfaction of judgment—sec. 675.

SUBDIVISION 3. Affidavit—sec. 2009 *et seq.* Deposition—sec. 2012 *et seq.*

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

- § 182. Subsequent applications for orders refused, when prohibited.
 § 183. Violations of preceding section.
 § 184. Proceedings not affected by vacancy in office.
 § 185. Proceedings to be in English language.
 § 186. Abbreviations and figures.
 § 187. Means to carry jurisdiction into effect.

§ 182. If an application for an order made to a Judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any Court Commissioner, or any other Judge, except of a higher court; but nothing in this section applies to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same.

Orders and motions generally—sec. 1003 *et seq.*

Orders, appealable—sec. 933, subd. 3.

Liberty to renew application—44 Cal. 235; 46 Cal. 285.

§ 183. A violation of the last section may be punished as a contempt; and an order made contrary thereto may be revoked by the Judge or Commissioner who made it, or vacated by a Judge of the court in which the action or proceeding is pending.

Penalty for violation—see secs. 906, 1209.

Ex parte order—vacating or modifying, sec. 937.

§ 184. No proceeding in any court of justice, in an action or special proceeding pending therein, shall be affected by a vacancy in the office of all or any of the judges thereof.

Vacancy—secs. 42, 70.

§ 185. Every written proceeding in a court of justice in this State shall be in the English language, and judicial proceedings shall be conducted, preserved, and published in no other.

Words and phrases—interpretation of, secs. 16, 17.

§ 186. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.

See sec. 185a.

§ 187. When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.

Stipulation enforcing—53 Cal. 630.

Process—authority over, 48 Cal. 123.

Suitable mode of proceeding—adopted, 50 Cal. 533, 544.

TITLE III.

**Persons Specially Invested with Powers
of a Judicial Nature.**

Chap. I. JURORS. §§ 190-254.

II. COURT COMMISSIONERS. §§ 258, 259

CHAPTER I.

JURORS.

- ARTICLE I. JURORS IN GENERAL.
- II. QUALIFICATIONS AND EXEMPTIONS OF JURORS.
 - III. OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.
 - IV. OF DRAWING JURORS FOR COURTS OF RECORD.
 - V. OF SUMMONING JURORS FOR COURTS OF RECORD.
 - VI. OF SUMMONING JURORS FOR COURTS NOT OF RECORD.
 - VII. OF SUMMONING JURORS OF INQUEST.
 - VIII. OBEDIENCE TO SUMMONS, HOW ENFORCED.
 - IX. OF IMPANNELED GRAND JURIES.
 - X. OF IMPANNELED TRIAL JURIES IN COURTS OF RECORD.
 - XI. OF IMPANNELED TRIAL JURIES IN COURTS NOT OF RECORD.
 - XII. OF IMPANNELED JURIES OF INQUEST.

ARTICLE I.

JURORS IN GENERAL.

- § 190. Jury defined.
- § 191. Different kinds of juries.
- § 192. Grand jury defined.
- § 193. Trial jury defined.
- § 194. Number of a trial jury.
- § 195. Jury of inquest defined.

§ 190. A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offense, or to try a question of fact.

Jurors—qualifications and exemptions, secs. 198-202; selecting and summoning, secs. 204-238; impanneling, secs. 241-254.

§ 191. Juries are of three kinds:

1. Grand juries;
2. Trial juries;
3. Juries of inquest.

§ 192. A grand jury is a body of men, nineteen in number, returned in pursuance of law, from the citizens of a county, or city and county, before a court of competent jurisdiction, and sworn to inquire of public offense committed or triable within the county, or city and county.

Grand jury, impanneling—secs. 241-242. How often drawn—Const. Cal. art. 1, sec. 8.

§ 193. A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact.

Trial by jury—secs. 600-619.

Verdict—when need not be unanimous, Const. Cal. art. 1, sec. 7. See also, sec. 618.

§ 194. A trial jury shall consist of twelve men; *provided*, that in civil actions and cases of misdemeanor, it may consist of twelve, or of any number less than twelve, upon which the parties may agree in open court.

Less than twelve—Const. Cal. art. 1, sec. 7; and see 18 Cal. 410.

§ 195. A jury of inquest is a body of men summoned from the citizens of a particular district before the Sheriff, Coroner, or other ministerial officer, to inquire of particular facts.

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

§ 196. Who competent to act as juror.

§ 199. Who not competent to act as juror.

§ 200. Who exempt from jury duty.

§ 201. Who may be excused.

§ 202. Affidavit of claim to exemption.

§ 198. A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years, who shall have been a resident of the State one year, and of the county, or city and county, ninety days before being selected and returned;

2. In possession of his natural faculties, and of ordinary intelligence, and not decrepit;

3. Possessed of sufficient knowledge of the English language;

4. Assessed on the last assessment-roll of the county, or city and county, on property belonging to him.

SUBDIVISION 1. Aliens—not competent, 17 Cal. 322; 51 Cal. 590.

Residence, generally—see Const. Cal. art. 2, sec. 4, art. 20, sec. 12; Political Code, sec. 62; 4 Cal. 175; 6 Cal. 410; 7 Cal. 91; 15 Cal. 48; 26 Cal. 142; 31 Cal. 261, 650.

Elector—juror formerly had to be—3 Cal. 108.

SUBDIVISION 3. 32 Cal. 40.

SUBDIVISION 4. 34 Cal. 672.

§ 199. A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section; or,

CODE CIV. PROC.—8.

2. Who has been convicted of malfeasance in office, or any felony or other high crime.

200. A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, or military officer of the United States, or of this State;

2. A person holding a county, city and county, or township office;

3. An attorney-at-law;

4. A minister of the gospel, or a priest of any denomination, following his profession;

5. A teacher in a university, college, academy, or school;

6. A practicing physician, or druggist, actually engaged in the business of dispensing medicines;

7. An officer, keeper, or attendant of an alms-house, hospital, asylum, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the State Prison, or of a county jail;

9. Employed on board of a vessel navigating the waters of this State;

10. An express agent, mail-carrier, superintendent, employé, or operator of a telegraph line doing a general telegraph business in the State, or keeper of a public ferry or toll-gate.

11. An active member of the National Guard of California, or an active member of a fire department of any city and county, city, town, or village in this State, or an exempt member of a duly organized fire company who had become exempt from jury duty before the passage of this act;

12. A superintendent, engineer, or conductor on a railroad; or,

13. A person drawn as a juror in any court of record in this State, upon a regular panel, who has served as such within a year; but this exemption shall not extend to a person who is summoned as a juror for the trial of a particular case.

Exemption—how claimed, sec. 202.

SUBDIVISION 11—Exempt fireman—Political Code, secs. 3339, 3340.

§ 201. A juror shall not be excused by a court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence.

§ 202. If a person, exempt from liability to act as a juror, as provided in section two hundred, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation, or employment; and such affidavit shall be delivered by the Clerk to the Judge of the court where the name of such person is called, and if sufficient in substance, shall be received as an excuse for non-attendance in person. The affidavit shall then be filed by the Clerk.

ARTICLE III.

OF SELECTING AND RETURNING JURORS.

- § 204. Jury lists, by whom and when to be made.
- § 205. How selection shall be made.
- § 206. Lists to contain how many names.
- § 208. Lists to be placed with Clerk.
- § 209. Duty of Clerk; jury boxes.
- § 210. Regular jurors to serve one year.
- § 211. Jurors to be drawn from boxes.

§ 204. In the month of January in each year it shall be the duty of the Superior Court in each of the counties of this State to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; and immediately after said order shall be made, the board of supervisors shall select, as provided in the next section, a list of persons to serve as grand jurors, and also a list of persons to serve as trial-jurors, in the Superior Court of said county, during the ensuing year, or until new lists of jurors shall be provided. In cities and counties having over one hundred thousand inhabitants, such selection shall be made by the judges of the Superior Court, or a majority of them if all do not attend. [In effect Jan. 1st, 1882.]

§ 205. They shall proceed to select and list the grand jurors required by said order of the Superior Court, and then select and list the trial jurors required by said order. Said selections and listings shall be made of persons suitable and competent to serve as jurors, who are assessed on the last preceding assessment roll of such county, or city and county; and in making such selections they shall take the names of such only as are not exempt from serving, who are in possession of their natural faculties, and not infirm or decrepit: of fair character and approved integrity, and of sound judgment [In effect Jan. 1st, 1882.]

§ 206. The list of jurors, to be made as provided in the preceding section, shall contain the number of persons which shall have been designated by the court in its order. The names for such lists shall be selected from the different wards or townships of the respective counties, in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making said lists; and said lists shall be kept separate and distinct one from the other. [In effect Jan. 1st, 1882.]

§ 208. Certified lists of the persons so selected to serve as grand jurors and as trial jurors shall at once be placed in possession of the county clerk. [Approved March 7th, 1881; to take effect July 1st, 1882.]

§ 209. On receiving such lists, the county clerk shall file the same in his office, and write down the names contained thereon on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon. He shall deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box, to be called the "grand jury box"; and those having on them the names of the persons selected to serve as trial jurors, in a box to be called the "trial jury box." [In effect July 1st, 1882.]

§ 210. The persons whose names are so returned shall be known as regular jurors, and shall serve for one year, and until other persons are selected and returned.

§ 211. The names of persons drawn for grand jurors shall be drawn from the "grand jury box," and the names of persons for trial jurors shall be drawn from the "trial jury box"; and if, at the end of the year, there shall be the names of persons in either of the said jury boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year. [In effect Jan. 1st, 1882.]

ARTICLE IV.

OF DRAWING JURORS FOR COURTS OF RECORD.

- § 214. Order of judge or judges for drawing of jury.
- § 215. Sheriff to be notified.
- § 219. Drawing, how conducted.
- § 220. Preservation of ballots drawn.

§ 214. Whenever the business of the Superior Court shall require the attendance of a trial jury for the trial of criminal cases, or where a trial jury shall have been de-

manded in any cause or causes at issue in said court, and no jury is in attendance, the court may make an order directing a trial jury to be drawn, and summoned to attend before said court. Such order shall specify the number of jurors to be drawn, and the time at which the jurors are required to attend. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued and fixed for trial when a jury shall be in attendance.

Superior Courts—secs. 65-79.

§ 215. Immediately upon the order mentioned in the preceding section being made, the clerk shall, in the presence of the court, proceed to draw the jurors from the "trial jury box." [In effect Jan. 1st, 1882.]

§ 219. The clerk must conduct said drawing as follows:

1. He must shake the box containing the names of the trial jurors, so as to mix the slips of paper upon which such names are written, as well as possible; he must then draw from said box as many slips of paper as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name on each slip of paper so drawn from said jury box.

3. If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper having such name on it shall be destroyed, and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary, until the whole number of jurors required be drawn. After the drawing shall be completed, the clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order and of the drawing, and the number of the jurors drawn, and the time when and the place where such jurors are required to appear. Such certificate and list shall be delivered to the sheriff for service. [In effect Jan. 1st, 1882.]

§ 220. After a drawing of persons to serve as jurors, the clerk shall preserve the ballots drawn, and at the close of the session or sessions for which the drawing was

had, he shall replace in the proper box from which they were taken all ballots which have on them the names of persons who did not serve as jurors for the session or sessions aforesaid, and who are not exempt or incompetent

ARTICLE V.

OF SUMMONING JURORS FOR COURTS OF RECORD.

- § 225. Sheriff to summon jurors, how.
- § 226. Of drawing and summoning jurors to attend forthwith.
- § 227. Of summoning jurors to complete a panel.
- § 228. Compensation of elisor.

§ 225. The Sheriff, as soon as he receives the list or lists of jurors drawn, shall summon the persons named therein to attend the court at the opening of the regular session thereof, or at such session or time as the court may order, by giving personal notice to that effect to each of them, or by leaving a written notice to that effect at his place of residence, with some person of proper age, and shall return the list to the court at the opening of the regular session thereof, or at such session or time as the jurors may be ordered to attend, specifying the names of those who were summoned, and the manner in which each person was notified.

Objection to juror—name not on venire, 9 Cal. 537.

Return—time for, is directory merely, 4 Cal. 275.

§ 226. Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the Sheriff, or an elisor chosen by the court, forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required, and in either case such jurors must be summoned in the manner provided in the preceding section.

Special jury—4 Cal. 218; 43 Cal. 344; 46 Cal. 47; 47 Cal. 93, 134; People v. Ah Chung, May 22nd, 1880.

Elisor—14 Cal. 123.

§ 227. When there are not competent jurors enough present to form a panel the court may direct the Sheriff, or an elisor chosen by the court, to summon a sufficient number of persons having the qualifications of jurors to complete the panel from the body of the county, or city and county, and not from the bystanders; and the Sheriff

or elisor shall summon the number so ordered accordingly and return the names to the court.

§ 228. An elisor who shall, by order of a court of record, summon persons to serve as jurors, shall be entitled to a reasonable compensation for his services, which must be fixed by the court and paid out of the county or city and county treasury, and out of the general fund thereof.

ARTICLE VI.

OF SUMMONING JURORS FOR COURTS NOT OF RECORD

- § 230. Jurors for Justices' or Police Courts.
- § 231. How to be summoned.
- § 232. Officer's return.

§ 230. When jurors are required in any of the Justices' Courts, or in any Police or other inferior court, they shall, upon the order of the Justice, or any one of the justices where there is more than one, or of the Judge thereof, be summoned by the Sheriff, constable, marshal, or policeman of the jurisdiction.

§ 231. Such jurors must be summoned from the persons competent to serve as jurors, residents of the city and county, township, city, or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required.

§ 232. The officer summoning such jurors shall, at the time fixed in the order for their appearance, return it to the court with a list of the persons summoned indorsed thereon.

ARTICLE VII.

OF SUMMONING JURIES OF INQUEST.

- § 235. How to be summoned.

§ 235. Juries of inquest shall be summoned by the officer before whom the proceedings in which they are to sit are to be had, or by any Sheriff, constable, or policeman, from the persons competent to serve as jurors, resident of the county, or city and county, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

§ 238. Attachment and fine.

§ 238. Any juror summoned, who willfully and without reasonable excuse fails to attend, may be attached and compelled to attend; and the court may also impose a fine not exceeding fifty dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until upon an order to show cause an opportunity has been offered the juror to be heard.

ARTICLE IX.

OF IMPANNELING GRAND JURIES.

§ 241. Grand jury, when to be impaneled.

§ 242. How constituted.

§ 243. Manner of impanneling prescribed in Penal Code.

§ 241. Every Superior Court, whenever in the opinion of the court the public interest must require it, may make and file with the county clerk an order directing a jury to be drawn, and designating the number, which, in case of a grand jury, shall not be less than twenty-five nor more than thirty. In all counties having less than three Superior Court judges, there shall be one grand jury drawn and impaneled in each year; and in all counties having three or more Superior Court judges, there shall be two grand juries drawn and impaneled in each year. Such order must designate the time at which the drawing will take place. The names of such jurors shall be drawn, the list of names certified and summoned, as provided for drawing and summoning trial jurors; and the names of any persons drawn, who may not be impaneled upon the grand jury, may be again placed in the grand jury box. [In effect Jan. 1st, 1882.]

Const. Cal. art. 1, sec. 8.

§ 242. When, of the persons summoned as grand jurors and not excused, nineteen are present, they shall constitute the grand jury. If more than nineteen of such persons are present, the Clerk shall write their names on separate ballots, which he must fold so that the names cannot be seen, place them in a box, and draw out nineteen of them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than

nineteen of such persons are present, the panel may be filled as provided in section two hundred and twenty-six of this Code. And whenever, of the persons summoned to complete a grand jury, more shall attend than are required, the requisite number shall be obtained by writing the names of those summoned and not excused on ballots, depositing them in a box, and drawing as above provided.

Special grand jury—47 Cal. 135.

§ 243. Thereafter such proceedings shall be had in impanneling the grand jury as are prescribed in part two of the Penal Code.

See Penal Code, secs. 894-901.

ARTICLE X.

OF IMPANNELING TRIAL JURIES IN COURTS OF RECORD.

§ 246. Clerk to call list of jurors summoned.

§ 247. Manner of impanneling prescribed in part two.

§ 246. At the opening of court on the day trial jurors have been summoned to appear, the Clerk shall call the names of those summoned, and the court may then hear the excuses of jurors summoned. The Clerk shall then write the names of the jurors present and not excused upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and there, in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed or locked until ordered by the court to be opened.

§ 247. Whenever thereafter a civil action is called by the court for trial, and a jury is required, such proceedings shall be had in impanneling the trial jury as are prescribed in part two of this Code. If the action be a criminal one, the jury shall be impaneled as prescribed in the Penal Code.

Civil action—see secs. 600-604.

Criminal case—see Penal Code, secs. 1055-1088.

ARTICLE XI.

OF IMPANNELING TRIAL JURIES IN COURTS NOT OF RECORD.

§ 250. Proceedings in forming jury.

§ 251. Manner of impanneling.

§ 250. At the time appointed for a jury trial in Justices', Police or other inferior courts, the list of jurors summoned must be called, and the names of those at-

§§ 251-54**JURORS.**

tending and not excused must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

§ 251. Thereafter, if the action is a criminal one, the jury must be impaneled as provided in the Penal Code if a civil one, as provided in part two of this Code.

See sec. 247.

ARTICLE XII.**OF IMPANNELING JURIES OF INQUEST.****§ 254. Manner of impanneling.**

§ 254. The manner of impanneling juries of inquest is prescribed in the provisions of the different codes relating to such inquests.

CHAPTER II.

COURT COMMISSIONERS.

§ 258. Appointment and qualifications.

§ 259. Powers of Court Commissioners.

§ 258. The Superior Court of every city and county in the State may appoint six commissioners, to be designated each as "Court Commissioners" of such city and county; and the Superior Court of every other county in the State may appoint one commissioner, to be designated as "Court Commissioner" of such county. Such commissioners shall be citizens of the United States, and residents of the city and county, or county, in which they are appointed, and hold offices during the pleasure of the courts appointing them.

Const. Cal. art. 6, sec. 14.

§ 259. Every Court Commissioner shall have power:

1. To hear and determine *ex parte* motions for orders and writs, except orders or writs of injunction in the Superior Court of the county, or city and county, for which he is appointed; *provided*, that he shall have power to hear and determine such motions only in the absence or inability to act of the Judge or Judges of the Superior Court of the county, or city and county;
2. To take proof and report his conclusions thereon as to any matter of fact other than an issue of fact raised by the pleadings, upon which information is required by the court; but any party to the proceedings may except to such report within five days after written notice that the same has been filed, and may argue his exceptions before the court on giving notice of motion for that purpose;
3. To take and approve bonds and undertakings whenever the same may be required in actions or proceedings in such Superior Courts, and to examine the sureties thereon when an exception has been taken to their sufficiency, and to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this State, or in any matter or proceeding whatever, and to take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof

or acknowledgment for any purpose under the laws of this State;

4. To charge and collect the same fees for the performance of official acts as are now or may hereafter be allowed by law to notaries public in this State for like services; *provided*, that this subdivision shall not apply to any services of such commissioner, the compensation for which is expressly fixed by law;

5. To provide an official seal, upon which must be engraved the words "Court Commissioner" and the name of the county, or city and county, in which said commissioner resides;

6. To authenticate with his official seal his official acts.

Judicial powers—persons having, order enforced before, sec. 128, subd. 2.

SUBDIVISION 1. *Ex parte* matters—sec. 166. Injunction—before codes, 28 Cal. 497. Extensions of time—before codes, 37 Cal. 338.

SUBDIVISION 2. Reference—*Harris v. S. F. S. R. Co.* 41 Cal. 404; generally, sec. 638 *et seq.*

SUBDIVISION 3. Sureties on undertakings—see sec. 1057. Oaths—see sec. 128, subd. 7; sec. 177, subd. 4. Other acts—see sec. 179, subd. 1, 3, and notes.

SUBDIVISION 4. Fees—Const. Cal. art. 6, sec. 15.

SUBDIVISION 5. Seals—discussed, sec. 14a.

TITLE IV.

Ministerial Officers of Courts of Justice.

- CHAPTER I. OF MINISTERIAL OFFICERS GENERALLY, §
262.
- II. SECRETARIES AND BAILIFFS OF THE SUPREME
COURT, §§ 265, 266.
- III. PHONOGRAPHIC REPORTERS, §§ 268-266.

CODE CIV. PROC.—9. [97]

CHAPTER I.

OF MINISTERIAL OFFICERS GENERALLY.

262. Election, powers, and duties, where prescribed.

§ 262. The modes and times of election, terms, power and duties of the Attorney-General, Clerk of the Supreme Court, Reporter of the Decisions of the Supreme Court, clerks, sheriffs, and coroners, are prescribed in the Political and Penal Codes.

Ministerial officers in general—see Const. Cal. art. 6, sec. 14; Political Code, secs. 865, 1030, 1031, 1055, 4112 to 4114, 4116, 4175 to 4193, 4206, 4314, 4315, 4332, 4333; Penal Code, secs. 1567, 1597, 1612; 4 Cal. 188, 206 Cal. 92; 16 Cal. 68; 25 Cal. 183; 35 Cal. 712; 36 Cal. 202.

Reporter of decisions—of Supreme Court, Const. Cal. art. 6, sec. 3; Political Code, secs. 767, 768, 771 *et seq.*

CHAPTER II.

SECRETARIES AND BAILIFFS OF THE SUPREME COURT.

§ 265. Appointment.

§ 266. Tenure of office, and duties.

§ 265. The Justices of the Supreme Court may appoint two secretaries and two bailiffs, who shall be citizens of the United States and of this State.

§ 266. The secretaries and bailiffs shall hold their offices at the pleasure of the justices, and shall perform such duties as may be required of them by the court or any justice thereof.

CHAPTER III.

PHONOGRAPHIC REPORTERS.

- § 268. Phonographic reporters for Supreme Court, where provided for
- § 269. Phonographic reporters for Superior Courts, their appointment and duties.
- § 270. Qualifications and test of competency.
- § 271. Attention to duties; reporters *pro tempore*.
- § 272. Oath of office.
- § 273. Reports *prima facie* correct statements.
- § 274. Fees.

§ 268. Phonographic reporters for the Supreme Court are provided for in part three of the Political Code.

See Political Code, secs. 739, 769, 770.

§ 269. The Judge or Judges of any Superior Court in the State may appoint a competent phonographic Reporter or as many such reporters as there are judges, to be known as official Reporter or reporters of such court, and to hold office during the pleasure of the Judge or judges appointing them. Such Reporter, or any one of them, when there are two or more, shall, at the request of either party or of the court in a civil action or proceeding, and on the order of the court, the District Attorney, or the attorney for defendant in a criminal action or proceeding, take down in short-hand all the testimony, the objections made, the rulings of the court, the exceptions taken, and oral instructions given, and if directed by the court, or requested by either party, shall, within such reasonable time after the trial of such case as the court may designate, write out the same in plain, legible long-hand, and verify and file it with the Clerk of the Court in which the case was tried.

Code amendments—before Const. 1879, sec. 49 Cal. 353.

Failure to file—effect of, 49 Cal. 263.

§ 270. No person shall be appointed to the position of official Reporter of any court in this State, except upon satisfactory evidence of good moral character, and without being first examined as to his competency by at least three members of the bar practicing in said court, such members to be designated by the Judge or judges of said court. The committee of members of the bar so designated shall, upon the request of the Judge or judges of

said court, examine any person as to his qualifications whom said Judge or judges may wish to appoint as official Reporter; and no person shall be appointed to such position upon whose qualifications such committee shall not have reported favorably. The test of competency before such committee shall be as follows: The party examined must write in the presence of said committee at the rate of at least one hundred and fifty words per minute, for five consecutive minutes, upon matter not previously written by or known to him, immediately read the same back to the committee, and transcribe the same into long-hand writing, plainly and with accuracy. If he pass such test satisfactorily, the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members of the committee, which certificate shall be filed among the records of the court.

§ 271. The official Reporter of any Superior Court shall attend to the duties of his office in person, except when excused for good and sufficient reason by order of the court, which order shall be entered upon the minutes of the court. Employment in his professional capacity elsewhere shall not be deemed a good and sufficient reason for such excuse. When the official Reporter of any court has been excused in the manner provided in this section, the court may appoint an official Reporter *pro tempore*, who shall perform the same duties and receive the same compensation during the term of his employment as the official Reporter.

§ 272. The official Reporter of any court, or official Reporter *pro tempore*, shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office.

§ 273. The report of the official Reporter, or official Reporter *pro tempore*, of any court, duly appointed and sworn, when written out in long-hand writing, and certified as being a correct transcript of the testimony and proceedings in the case, shall be, *prima facie*, a correct statement of such testimony and proceedings.

Report as evidence—43 Cal. 176; *People v. Lee Fat*, April 8th, 1880.

§ 274. The official Reporter shall receive, as compensation for his services in civil actions and proceedings, for taking notes, a sum, to be fixed by the court, or a Judge thereof, not exceeding ten dollars per day, and for transcription, a sum, to be in like manner fixed, not exceeding twenty cents per hundred words; *provided*, that

when said Reporter performs services in taking notes more than one cause on the same day, the court or Judge thereof shall apportion the per diem allowed between the several actions or proceedings in which such notes are taken. The short-hand notes so taken shall, immediately after the cause is submitted, be filed with the Clerk but for the purpose of writing out said notes, the Reporter may withdraw the same for a reasonable time. The Reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered and shall be taxed up by the Clerk of the court as costs against the party against whom judgment is rendered. In case of the failure of a jury to agree, the plaintiff must pay the Reporter's fees for time employed, and if transcription ordered by plaintiff, which have accrued up to the time of the discharge of the jury. In cases where a transcript has been ordered by the court, the fees for transcription must be paid by the respective parties in the action, in equal proportions, or by such of them as the court, in its discretion, may order; and no verdict or judgment shall be entered unless the court shall otherwise order, until the Reporter's fees are paid, or a sum equivalent thereto deposited with the Clerk of the court therefor. In no case shall a transcript be paid for, unless ordered either by the plaintiff or defendant, or by the court; nor shall the Reporter be required in any civil case to transcribe his notes until the fees therefor be tendered him, or a sufficient amount to cover the same be deposited in court for that purpose. The party ordering the Reporter to transcribe any portion of the testimony or proceedings must pay the fees of the Reporter therefor. In criminal cases when the testimony has been taken down or transcribed upon the order of the court, the fees of the Reporter shall be certified by the court, and paid out of the treasury of the county, or city and county, in which the case is tried, upon the order of the court.

TITLE V.

Persons Specially Invested with Ministerial Powers Relating to Courts of Justice.

CHAPTER I. ATTORNEYS AND COUNSELLORS AT LAW, §§ 275-299.

II. OTHER PERSONS INVESTED WITH SUCH POWERS, § 304.

CHAPTER I

ATTORNEYS AND COUNSELLORS AT LAW

- § 275. Who may be admitted as attorneys.
- 276. Qualifications.
- 277. Certificate of admission and license.
- 278. Oath.
- 279. Attorneys of other States.
- 280. Roll of attorneys.
- 281. Penalty for practicing without license.
- 282. Duties.
- 283. Authority.
- 284. Change of attorney.
- 285. Notice of change.
- 286. Death or removal of attorney.
- 287. Removal and suspension.
- 288. Conviction of felony.
- 289. Proceedings for removal or suspension.
- 290. Accusation.
- 291. Verification.
- 292. Citation.
- 293. Appearance.
- 294. Objections to accusation.
- 295. Demurrer.
- 296. Answer.
- 297. Trial.
- 298. Reference to take depositions.
- § 299. Judgment.

§ 275. Any citizen or person resident of this State, who has *bona fide* declared his or her intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counsellor in all the courts of this State. All persons are attorneys of the Supreme Court who were on the first day of January, eighteen hundred and eighty, entitled to practice in the court superseded thereby.

Declaration of intention—22 Cal. 85.

Women as law students—*Foltz v. Hoge*, December 20th, 1879.

Admission of attorneys—see sections following this.

Judges must be licensed attorneys—secs. 156, 157.

Judicial and ministerial officers—not to practice, see Political Code, sec. 4121; also, secs. 171, 172, *ante*.

Generally—3 Cal. 108; 8 Cal. 570; 15 Cal. 387; 20 Cal. 427; 22 Cal. 236; 24 Cal. 241; 31 Cal. 11; 33 Cal. 425; 35 Cal. 534.

§ 276. Every applicant for admission as an attorney and counsellor must produce satisfactory testimonials of good moral character, and undergo a strict examination in open court as to his qualifications by the Justices of the Supreme Court, or by the justices sitting and holding one of the departments thereof; *provided*, that the several Superior Courts of this State may admit applicants to practice as attorneys and counsellors in their respective courts, but not elsewhere, upon strict examination in open court, and not otherwise, and upon satisfactory testimonials of good moral character.

Examination of candidates—sec. 129; Supreme Ct. rule 1.

§ 277. If, upon examination, he is found qualified, the Supreme Court, or department thereof before which he is examined, shall admit him as an attorney and counsellor in all the courts of this State, and shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the Clerk of the court, which certificate shall be his license.

Expulsion—by lower court, 1 Cal. 190; but see sec. 287.

§ 278. Every person, on his admission, must take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of an attorney and counsellor at law to the best of his knowledge and ability. A certificate of such oath must be indorsed upon the license.

2 Cal. 329; 24 Cal. 244.

Duties—see sec. 282.

§ 279. Every citizen of the United States, or person resident of this State, who has, *bona fide*, declared his intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of a sister State, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, may be admitted to practice in the courts of this State, upon the production of his or her license, and satisfactory evidence of good moral character; but the court may examine the applicant as to his or her qualifications.

Personal appearance—necessary, 44 Cal. 554.

"State" and "United States"—defined, sec. 17, subd. 7.

§ 280. Every Clerk shall keep a roll of attorneys and counsellors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives his license.

Attorneys of the Supreme Court—sec. 275.

§§ 281-3 ATTORNEYS AND COUNSELLORS AT LAW.

§ 281. If any person shall practice law in any court except a Justice's Court or Police Court, without having received a license as attorney and counsellor, he shall be guilty of a contempt of court.

Contempt—sec. 1203 *et seq.*

Justices' Court practitioners—sec. 96.

§ 282. It is the duty of an attorney and counsellor:

1. To support the Constitution and laws of the United States and of this State;

2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal or just, except the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest;

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed.

Compensation—sec. 1021; 1 Cal. 331; 2 Cal. 507; 3 Cal. 108; 5 Cal. 435; 6 Cal. 56; 8 Cal. 306; 11 Cal. 93; 13 Cal. 640; 17 Cal. 61; 41 Cal. 423; 45 Cal. 534; 48 Cal. 74.

Liability—3 Cal. 108; 13 Cal. 203; 22 Cal. 200; 33 Cal. 425; 50 Cal. 121.

SUBDIVISION 1. Oath—sec. 278.

SUBDIVISION 3. Offender, public—defense of. See Penal Code, sec. 987; see also, subd. 8.

SUBDIVISIONS 3, 7—41 Cal. 423; 45 Cal. 564; 48 Cal. 74; 50 Cal. 485; 53 Cal. 372; *Walker v. Felt*, March 22nd, 1880.

SUBDIVISION 5—5 Cal. 450; 15 Cal. 387; 23 Cal. 331; 29 Cal. 47; 33 Cal. 425; 34 Cal. 610; 36 Cal. 489; 40 Cal. 284; 53 Cal. 372.

SUBDIVISION 8—17 Cal. 61; 49 Cal. 158.

§ 283. An attorney and counsellor shall have authority:

1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the Clerk, or entered upon the minutes of the court, and not otherwise;

2. To receive money claimed by his client in an action

or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

Authority—presumed, 13 Cal. 200; 17 Cal. 431; 21 Cal. 51; 23 Cal. 649; 26 Cal. 128; 31 Cal. 128, 166; 35 Cal. 540; 39 Cal. 683; 44 Cal. 284; 48 Cal. 592; extent of, see subsds. 1 and 2, and 28 Cal. 138; 31 Cal. 17; 35 Cal. 463; 42 Cal. 148; 43 Cal. 465; 44 Cal. 204; 45 Cal. 72; 53 Cal. 372, 663, 735; also, sec. 446.

SUBDIVISION 1. Stipulations—generally, 9 Cal. 277; 10 Cal. 216, 217; 11 Cal. 37, 405; 15 Cal. 360; 18 Cal. 698; 19 Cal. 126; 20 Cal. 172, 680; 22 Cal. 493; 26 Cal. 319; 29 Cal. 464; 31 Cal. 17, 148, 398; 33 Cal. 556; 37 Cal. 23, 158; 41 Cal. 633; 43 Cal. 478, 637; 44 Cal. 210, 248; 47 Cal. 164; 48 Cal. 131, 154; 49 Cal. 146, 219; 50 Cal. 308; 53 Cal. 663; *Walker v. Felt*, March 22nd, 1880; *must be in writing*, 2 Cal. 92; 3 Cal. 187; 19 Cal. 36; 21 Cal. 308; 29 Cal. 149; 38 Cal. 623; 40 Cal. 126; 50 Cal. 308; 52 Cal. 238. **Admissions and consents**—sec. 33a; secs. 415, 595; 1 Cal. 213; 2 Cal. 92; 3 Cal. 185; 5 Cal. 80; 8 Cal. 77; 9 Cal. 277; 11 Cal. 405; 13 Cal. 191; 16 Cal. 567; 22 Cal. 456, 657; 23 Cal. 147; 35 Cal. 467; 37 Cal. 158; 40 Cal. 184, 284; 45 Cal. 60; 49 Cal. 340; 53 Cal. 308, 441, 447; 53 Cal. 281, 735; *Preston v. Eureka A. S. Co.* Feb. 23rd, 1880; *Conniff v. Kahn*, March 23rd, 1880.

SUBDIVISION 2. Compromise—50 Cal. 43; 53 Cal. 28.

Satisfaction—entry of, sec. 675; 48 Cal. 632.

§ 284. The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon consent of both client and attorney, filed with the Clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

16 Cal. 436; 33 Cal. 208.

SUBDIVISION 2. Associating attorney—53 Cal. 221.

§ 285. When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney.

Attorney of record—6 Cal. 55; 16 Cal. 436; *Commissioners v. Younger*, 29 Cal. 149; 33 Cal. 208; 53 Cal. 221; *McDonald v. McConky*, Feb. 6th, 1880; *Preston v. Eureka A. S. Co.* Feb. 23rd, 1880.

§ 286. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

§ 287. An attorney and counsellor may be removed or suspended by the Supreme Court, or any department thereof, or by any Superior Court of the State, for either of the following causes, arising after his admission to practice:

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence;

2. Willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counsellor;

3. Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding;

4. Lending his name to be used as attorney and counsellor by another person who is not an attorney and counsellor.

In all cases where an attorney is removed or suspended by a Superior Court, the judgment or order of removal or suspension may be reviewed on appeal by the Supreme Court.

Restoration—1 Cal. 143, 190; 16 Cal. 435.

Infamous—not to be adjudged, 20 Cal. 427.

§ 288. In case of the conviction of an attorney or counsellor of a felony or misdemeanor, involving moral turpitude, the Clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the Supreme Court a certified copy of the record of conviction.

§ 289. The proceedings to remove or suspend an attorney and counsellor, under the first subdivision of section two hundred and eighty-seven, must be taken by the court on the receipt of a certified copy of the record of conviction. The proceedings under the second, third, or fourth subdivisions of section two hundred and eighty-seven may be taken by the court for the matters within its knowledge, or may be taken upon the information of another.

§ 290. If the proceedings are upon the information of another, the accusation must be in writing.

§ 291. The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true.

§ 292. Upon receiving the accusation, the court shall make an order requiring the accused to appear and answer it at a specified time, and shall cause a copy of the order and of the accusation to be served upon the accused at least five days before the day appointed in the order.

Notice to accused—1 Cal. 151.

§ 293. The accused must appear at the time appointed in the order and answer the accusations, unless for sufficient cause the court assign another day for that purpose. If he do not appear, the court may proceed and determine the accusation in his absence.

§ 294. The accused may answer to the accusation either by objecting to its sufficiency or denying it.

§ 295. If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

§ 296. If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court.

§ 297. If the accused plead guilty, or refuse to answer the accusation, the court shall proceed to judgment of removal or suspension. If he deny the matters charged, the court shall, at such time as it may appoint, proceed to try the accusation.

§ 298. The court may, in its discretion, order a reference to a committee to take depositions in the matter.

§ 299. Upon conviction, in cases arising under the first subdivision of section two hundred and eighty-seven, the judgment of the court must be that the name of the party shall be stricken from the roll of attorneys and counsellors of the court, and that he be precluded from practicing as such attorney or counsellor in all the courts of this State; and upon conviction in cases under the other subdivisions of that section, the judgment of the court may be according to the gravity of the offense charged: deprivation of the right to practice as attorney or counsellor in the courts of this State permanently, or for a limited period.

CHAPTER II.

OTHER PERSONS INVESTED WITH SUCH POWERS.

§ 304. Receivers, executors, administrators, and guardians.

§ 304. The appointment, powers, and duties of receivers, executors, administrators, and guardians, are provided for and prescribed in parts two and three of this Code.

Receivers—secs. 564-569.

Executors and administrators—secs. 1349-1440, 1581-1591; also, secs. 1612-1653, and 1726-1743.

Guardians—secs. 1747-1809.

SEC. 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

SEC. 3. This act shall take effect immediately.

— —, President of the Senate.

— —, Speaker of the Assembly.

Approved, —, A. D. 1880. — —, Governor.

PART II. OF CIVIL ACTIONS.

- I. FORM OF CIVIL ACTIONS. §§ 307-309.
- II. TIME OF COMMENCING CIVIL ACTIONS. §§ 312-362.
- III. PARTIES TO CIVIL ACTIONS. §§ 367-389.
- IV. PLACE OF TRIAL OF CIVIL ACTIONS. §§ 392-400.
- V. MANNER OF COMMENCING SUIT. § 405-416.
- VI. PLEADINGS IN CIVIL ACTIONS. §§ 420-476.
- VII. PROVISIONAL REMEDIES IN CIVIL ACTIONS. §§ 478-574.
- VIII. TRIAL AND JUDGMENT IN CIVIL ACTIONS. §§ 577-675.
- IX. EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS. §§ 681-721.
- X. ACTIONS IN PARTICULAR CASES. §§ 726-827.
- XI. PROCEEDINGS IN JUSTICES' COURTS. §§ 832-925.
- XII. PROCEEDINGS IN POLICE COURTS. §§ 929-933.
- XIII. APPEALS IN CIVIL ACTIONS. §§ 936-980.
- XIV. MISCELLANEOUS PROVISIONS. §§ 989-1058.

TITLE I.

Of the Form of Civil Actions.

§ 307. One form of civil action only.

§ 308. Parties to actions, how designated.

§ 309. Special issues not made by pleadings, how tried.

§ 307. There is in this State but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs.

See sec. 421; 1 Cal. 167; 2 Cal. 463; 3 Cal. 196, 459; 4 Cal. 6; 5 Cal. 43; 12 Cal. 143; 15 Cal. 220; 16 Cal. 221; 17 Cal. 487; 18 Cal. 126; 19 Cal. 476; 21 Cal. 129; 24 Cal. 458; 26 Cal. 11; 31 Cal. 158; 38 Cal. 519.

§ 308. In such action, the party complaining is known as the plaintiff, and the adverse party as the defendant.

§ 309. A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.

Equity cases—issues in, sec. 592.

TITLE II.

Of the Time of Commencing Actions.

- CHAP. I. The time of commencing actions in general. § 312.
- II. The time of commencing actions for the recovery of real property. §§ 315-328.
- III. The time of commencing actions other than for the recovery of real property. §§ 335-345.
- IV. General provisions as to the time of commencing actions. §§ 350-362.

CHAPTER I.

THE TIME OF COMMENCING ACTIONS IN GENERAL.

§ 312. Commencement of civil actions.

§ 312. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

Scope of statute—secs. 315, 360; 7 Cal. 427; 18 Cal. 482; 29 Cal. 44; 35 Cal. 634; 42 Cal. 493; 45 Cal. 51; 46 Cal. 661; 47 Cal. 573; Grant v. Burr, March 12th, 1880.

Periods—See LIMITATIONS GENERALLY, *infra*.

Commencement of action—secs. 350 *et seq.*, 405.

Accruing of cause of action—*Generally*, 6 Cal. 53, 430, 617; 7 Cal. 27; 12 Cal. 482; 13 Cal. 540; 14 Cal. 134; 18 Cal. 378; 19 Cal. 85; 20 Cal. 25; 22 Cal. 225, 556; 24 Cal. 114; 25 Cal. 593; 27 Cal. 57, 119, 274, 376; 28 Cal. 47, 503; 34 Cal. 149, 254; 35 Cal. 635; 38 Cal. 407; 39 Cal. 360; 40 Cal. 547; 41 Cal. 111, 484, 686; 42 Cal. 159; 45 Cal. 294; 47 Cal. 579; 50 Cal. 26; 51 Cal. 215, 573; 52 Cal. 42; Wolf v. Marsh, March 1st, 1880; Frenouth v. Farrington, March 3rd, 1880; *Suspension of statute*, 38 Cal. 24, 24; 49 Cal. 314; *Equity, stale demands*, 7 Cal. 427; 40 Cal. 547; 41 Cal. 351; Harris v. Hillegass, March 30th, 1880; *Current account*, sec. 344; *Entrusted property*, sec. 348; 16 Cal. 173; 18 Cal. 74; 27 Cal. 274; 38 Cal. 335; 44 Cal. 221; 47 Cal. 154; *Fraud or mistake*, sec. 338, subd. 4.

LIMITATIONS GENERALLY.

Absence from State—sec. 351, and note. Account—current, see *supra*. Accruing of cause of action—see *supra*. Acknowledgment—in writing, sec. 360. Action—commencement of, see *supra*; word construed, sec. 363. Adverse possession—sec. 321a. Alien enemy—sec.

354. Assault—sec. 340, subd. 3. Bank deposits—sec. 348. Battery—sec. 340, subd. 3. Claim—against estate of decedent, secs. 1493, 1499. Codes—as affecting—see REPEALS. Contract—see OBLIGATION. Corporation—foreign, sec. 351n; municipal, sec. 340, subd. 5. County—sec. 342. Death—secs. 339, subd. 3, 353; descent on, sec. 327. Decree—see JUDGMENT. Demands—State, see EQUITY; reciprocal, sec. 344. Depositories—see ENTRUSTED PROPERTY. Disability—secs. 323, 352, 357, 358. Entry—sec. 320. Entrusted property—see *supra*. Equity—State demands, see *supra*. Estate—see CLAIM. Foreign liability—sec. 361; corporation, sec. 351n. Fraud or mistake—see *supra*. Grantee—from State, sec. 316. Imprisonment—false, sec. 340, subd. 3; as DISABILITY, see that head. Inclosure—sec. 323n. Injury—to personalty, sec. 338, subd. 3; causing death, sec. 339n, and subd. 3. Insanity—see DISABILITY, also 27 Cal. 384. Instrument, written—Occupancy, under, secs. 322, 323; otherwise, secs. 324, 325. Obligation or liability, founded upon, sec. 337; not so founded, sec. 339, subd. 1; executed out of State, founded upon; sec. 339n, and subd. 1. Judgment—action on, sec. 336n; occupancy under and otherwise, secs. 322 to 325. Liability—based on writing, and otherwise, 337n, 339n; statutory, sec. 338n, and subd. 1; of sheriff, etc., sec. 339n and subd. 2. Libel—sec. 340, subd. 3. Mexican grants—sec. 318n. Miscellaneous provisions—sec. 350 *et seq.* Mob or riot—sec. 340, subd. 5. Mortgages—Foreclosure, 18 Cal. 482; 21 Cal. 495; 22 Cal. 100, 631; 23 Cal. 16, 143; 24 Cal. 403; 25 Cal. 492; 26 Cal. 141, 161; 27 Cal. 146; 30 Cal. 229; 33 Cal. 121; 34 Cal. 149, 366; 40 Cal. 62; 42 Cal. 493; 43 Cal. 183; Wells v. Harter, March 19th, 1880; Redemption, secs. 346, 347; 23 Cal. 16; 24 Cal. 403; 33 Cal. 92; 34 Cal. 365; 40 Cal. 62. New promise—see ACKNOWLEDGMENT. Obligation—written, sec. 337n; verbal, sec. 339n. Officer—see SHERIFF, and sec. 341. Patent—or grant, void, sec. 317. Payment—part, sec. 360n. Penalty—or forfeiture, statutory, sec. 340, subds. 1 and 2. Periods—secs. 315, 318, 321, 326, 337 and note, 338 and note, 339, 340 and note. Pleading—mode of, sec. 458; also, see secs. 430, 437, 443, 462; 17 Cal. 569; 25 Cal. 82; 27 Cal. 274; 28 Cal. 107; 30 Cal. 673; 35 Cal. 122; 45 Cal. 128; 46 Cal. 7; 47 Cal. 291; 49 Cal. 301; 50 Cal. 525; and further, see generally, 12 Cal. 311; 18 Cal. 67; 19 Cal. 85; 20 Cal. 211; 22 Cal. 457; 29 Cal. 20; 30 Cal. 65; 31 Cal. 337; 33 Cal. 121, 505; 36 Cal. 187, 625; 38 Cal. 335; 40 Cal. 264; 51 Cal. 264; 52 Cal. 257, 262; necessary to make defense available, see WAIVER OF STATUTE. Possession—adverse, see that head; constructive, sec. 323n; of tenant, sec. 326. Predecessor—sec. 318n. Profits—action about, sec. 319; for mesne, sec. 336, subd. 2. Promissory note—sec. 337n. Public—squares, sec. 318n; statute against, sec. 315n. Real property—sec. 315 *et seq.* Renewal—of contract, sec. 360n. Rents—or profits, sec. 319. Repeals—secs. 9, 18, 362. Representatives—sec. 353n. Reward—sec. 337n. Scope of statute—see *supra*. Seduction—sec. 340, subd. 3. Sheriff—sec. 339n, and subd. 2; sec. 340, subd. 4. Slander—sec. 340, subd. 3. State—sec. 345; people of, sec. 315; also, see secs. 339, subd. 1; 340, subds. 1 and 2; 351. States—other, limitations in, sec. 361; and see U. S. GOVERNMENT. Statute—action upon, secs. 338, subd. 1; and 340, subds. 1 and 2. Statute of Limitations—in general, 6 Cal. 331, 430; 7 Cal. 1; 8 Cal. 449; 10 Cal. 305; 16 Cal. 93; 21 Cal. 421, 495; 27 Cal. 145, 278; 35 Cal. 634; 36 Cal. 180; scope of, suspension of, waiver of, see those heads. Stock—sec. 341n, and subd. 2. Suspension of statute—generally, see ACCRUING OF CAUSE OF ACTION, *supra*; absence, disability, death, see those heads; war, sec. 354; appeal, sec. 355; injunction, sec. 356; statutory prohibition, sec. 356; discovery, until, secs. 338, subd. 4; 359, 1573. Tax—seizure for, sec. 341n, and subd. 1. Title—by occupancy or prescription, secs. 315n, 324n; real action arising out of, sec. 319. Trespass upon realty—sec. 338n, and subd. 2. Trust, trustees—see ENTRUSTED PROPERTY, *supra*. U. S. Govern-

ment—against, 24 Cal. 257; 45 Cal. 51; 46 Cal. 661; 47 Cal. 570. Van Ness Ordinance—sec. 312a. Waiver of statute—unless pleaded, sec. 434; 2 Cal. 469; 14 Cal. 540; 19 Cal. 476; 23 Cal. 16.

CHAPTER II.

THE TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

- § 315. When the people will not sue.
- § 316. When action cannot be brought by grantee from the State.
- § 317. When actions by the people or their grantees are to be brought within five years.
- § 318. Seizin within five years, when necessary in action for real property.
- § 319. Such seizin, when necessary in action or defense arising out of title to or rents of real property.
- § 320. Entry on real estate.
- § 321. Possession, when presumed. Occupation deemed under legal title, unless adverse.
- § 322. Occupation under written instrument or judgment, when deemed adverse.
- § 323. What constitutes adverse possession under written instrument or judgment.
- § 324. Premises actually occupied under claim of title deemed to be held adversely.
- § 325. What constitutes adverse possession under claim of title not written.
- § 326. Relation of landlord and tenant, as affecting adverse possession.
- § 327. Right of possession not affected by descent cast.
- § 328. Certain disabilities excluded from time to commence actions.

§ 315. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.

People as party—to suit, generally, sec. 367n.

Title by occupancy—Civil Code, sec. 1007.

Public—statute does not run against, 18 Cal. 619; 24 Cal. 257; 40 Cal. 34; 53 Cal. 437. See also, U. S. GOVERNMENT, under LIMITATIONS GENERALLY, sec. 312n.

Accruing of cause of action—sec. 312n.

§ 316. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this State, unless the same might have been commenced by the people as herein specified, in case such patent had not been issued or grant made.

§ 317. When letters patent or grants of real property issued or made by the people of this State, are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the people of the State, or by any subsequent patentee or grantee of the property, his heirs or assigns, within five years after such determination, but not after that period. [In effect July 1st, 1874.]

§ 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

Generally—15 Cal. 284; 25 Cal. 593.

Pleading—see LIMITATIONS GENERALLY, sec. 312*n*, and 33 Cal. 511.

“Action”—defined, sec. 363.

Recovery of real property—13 Cal. 522.

Plaintiff's predecessor—28 Cal. 180; 30 Cal. 229.

Adverse possession—by grantor, 50 Cal. 485; by wife, 49 Cal. 103; in general, sec. 321.

Five years—within, 18 Cal. 434; 33 Cal. 511.

Probate court sales—secs. 1573, 1806.

Trespass upon realty—sec. 338.

Possession—presumption from, sec. 1963, subd. 11.

Mexican grants—6 Cal. 381; 7 Cal. 1; 20 Cal. 225; 24 Cal. 124, 300; 26 Cal. 24; 27 Cal. 57; 29 Cal. 580; 31 Cal. 225; 33 Cal. 456; 34 Cal. 365; 36 Cal. 632; 39 Cal. 262; 40 Cal. 308; 43 Cal. 286; 47 Cal. 570, 588; 48 Cal. 406; 49 Cal. 12; 50 Cal. 465, 485; 51 Cal. 55, 165, 186.

Public squares—50 Cal. 265.

Van Ness ordinance—43 Cal. 506; 47 Cal. 269; 50 Cal. 275.

Water rights—8 Cal. 136; 25 Cal. 504; 27 Cal. 360; 32 Cal. 26.

§ 319. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made.

Construction of section—24 Cal. 303.

Rents or profits—29 Cal. 330.

“Effectual”—24 Cal. 304.

“Commencement of the act”—24 Cal. 304.

§ 320. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued.

§ 321. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

Adverse possession—secs. 322-325; 8 Cal. 144; 16 Cal. 591; 21 Cal. 455; 22 Cal. 580; 25 Cal. 619; 28 Cal. 175, 611; 30 Cal. 229, 630; 31 Cal. 154, 535; 33 Cal. 565; 34 Cal. 381; 35 Cal. 634; 36 Cal. 126, 535; 37 Cal. 353; 39 Cal. 262; 40 Cal. 296; 41 Cal. 264, 541; 42 Cal. 403, 662; 43 Cal. 250, 506; 44 Cal. 471, 509, 559, 616; 45 Cal. 559; 46 Cal. 8, 256; 47 Cal. 259, 485; 48 Cal. 15, 615; 49 Cal. 16, 497; 50 Cal. 258; 51 Cal. 362, 545; 52 Cal. 257, 282; 53 Cal. 135, 437.

Title conferred—by adverse holding, 34 Cal. 381; 51 Cal. 55.

Forcible entry—one year, sec. 1172.

§ 322. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Generally—see ADVERSE POSSESSION, sec. 321*n*.

Deed with specific boundaries—see CONSTRUCTIVE POSSESSION, sec. 323*n*.

§ 323. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;
2. Where it has been protected by a substantial inclosure;
3. Where, although not inclosed, it has been used for

the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;

4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Constructive possession—23 Cal. 431; 30 Cal. 358, 408, 676; 31 Cal. 225; 33 Cal. 427, 487, 674; 45 Cal. 559; 50 Cal. 26.

Inclosure—41 Cal. 571.

§ 324. Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

Generally—45 Cal. 559.

Prescription—title by, Civil Code, sec. 1007.

§ 325. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

First—Where it has been protected by a substantial inclosure.

Second—Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied and assessed upon such land. [Approved April 1st, 1878.]

30 Cal. 408; 32 Cal. 15; Thompson v. Felton, May 7th, 1880.

§ 326. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired

another title, or may have claimed to hold adversely to his landlord. But such presumption cannot be made after the periods herein limited.

Construction of section—44 Cal. 388.

Tenant denying landlord's title—sec. 1962, subd. 4.

Generally—33 Cal. 237; 48 Cal. 614.

§ 327. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

§ 328. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title first depends or accrues, either—

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than his life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense;

The time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period.

Disability—see LIMITATIONS GENERALLY, sec. 312a.

Cotenant's rights—43 Cal. 66.

Infant—51 Cal. 186.

Married woman—12 Cal. 408; husband as party, sec. 370.

CHAPTER III.

THE TIME OF COMMENCING ACTIONS
OTHER THAN FOR THE RECOVERY
OF REAL PROPERTY.

- 335. Periods of limitation prescribed.
- 336. Within five years.
- 337. Within four years.
- 338. Within three years.
- 339. Within two years.
- 340. Within one year.
- 341. Within six months.
- 342. Same.
- 343. Actions for relief not hereinbefore provided for.
- 344. Where cause of action accrues on mutual account.
- 345. Actions by the people subject to the limitations of this chapter.
- 346. Action to redeem mortgage.
- 347. Same, when some of mortgagors are not entitled to redeem.

§ 335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

§ 336. Within five years:

1. An action upon a judgment or decree of any court of the United States, or of any State within the United States;
2. An action for mesne profits of real property. [In effect July 1st, 1874.]

Judgment or decree—4 Cal. 250, 287; 7 Cal. 747; 16 Cal. 372; 19 Cal. 97; 20 Cal. 211; 23 Cal. 352, 597; 34 Cal. 667; *Trenouth v. Farrington*, March 3rd, 1880; *Wheeler v. Bolton*, March 13th, 1880.

Foreign liability—sec. 361.

§ 337. Within four years:

An action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this State. [In effect July 1st, 1874.]

Instrument in writing—14 Cal. 137; 24 Cal. 322.

Promissory note—12 Cal. 482; 18 Cal. 378; 29 Cal. 505; 38 Cal. 242, 407; 45 Cal. 294; 47 Cal. 579; 50 Cal. 456; *Wolf v. Marsh*, March 1st, 1880; *Grant v. Burr*, March 12th, 1880.

Mortgage notes—see MORTGAGES, under LIMITATIONS GENERALLY, sec. 312n.; also, 53 Cal. 375.

Written obligations, generally—5 Cal. 57; 6 Cal. 617; 10 Cal. 126; 17 Cal. 172; 18 Cal. 482; 20 Cal. 130; 21 Cal. 495; 22 Cal. 558, 620; 23 Cal. 16, 223; 24 Cal. 403; 34 Cal. 149, 165; 42 Cal. 169, 493; 43 Cal. 185.

Four years—limitation where no other provision, sec. 343.

§ 338. Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture;

2. An action for trespass upon real property;
3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;
4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Statutory liability—18 Cal. 176; 39 Cal. 654; 45 Cal. 12, 611.

Trespass upon real property—29 Cal. 330; 31 Cal. 154, 487.

Fraud or mistake—8 Cal. 449; 9 Cal. 423; 13 Cal. 552; 18 Cal. 225; 27 Cal. 34; 29 Cal. 19, 44; 34 Cal. 254; 50 Cal. 290; 52 Cal. 619; see also, sec. 339.

Three years—probate matters, secs. 1573, 1574, 1865, 1866; against corporation directors or stockholders, sec. 359.

§ 339. Within two years:

1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the State;
2. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape;
3. An action to recover damages for the death of one caused by the wrongful act or neglect of another. [In effect July 1st, 1874.]

Design of section—50 Cal. 646.

Verbal obligation or liability—6 Cal. 53; 17 Cal. 594; 20 Cal. 130; 21 Cal. 351; 23 Cal. 457; 24 Cal. 322; 35 Cal. 122; 49 Cal. 266; 51 Cal. 215, 531; 52 Cal. 42.

Continuous employment—47 Cal. 162.

Extra-State instrument—4 Cal. 237.

Action against sheriff—see *Sharp v. Miller*, March 18th, 1880.

Injury causing death—50 Cal. 612.

Mortgage debt—see MORTGAGES, under LIMITATIONS GENERALLY, sec. 312a.

§ 340. Within one year:

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation;
2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of the State;

CODE CIV. PROC.—11.

3. An action for libel, slander, assault, battery, false imprisonment, or seduction;

4. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;

5. An action against a municipal corporation for damages or injuries to property caused by a mob or riot. [In effect January 27th, 1876.]

One year—forcible entry, adverse holding, sec. 1172; against decedent's representatives, sec. 353; after reversal on appeal, sec. 355; entry upon real property, sec. 320.

§ 341. Within six months:

An action against an officer, or officer *de facto*:

1. To recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure;

2. To recover stock sold for a delinquent assessment, as provided in sec. 347 of the Civil Code. [In effect July 1st, 1874.]

Protested tax suit—50 Cal. 303.

Stock sold for assessment—Civil Code, sec. 347.

Six months—against county, sec. 342; by decedent's representatives, sec. 353.

§ 342. Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board.

§ 343. An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.

Relief not provided for—17 Cal. 586; 52 Cal. 42; *Wheeler v. Bolton*, March 13th, 1880.

Equity, stale demands—see ACCRUING OF CAUSE OF ACTION, sec. 312*n*.

Relief, generally—sec. 580*n*.

Bank deposits—no limitation, sec. 348.

§ 344. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the

cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Mutual account—17 Cal. 351; 30 Cal. 126, 134; 35 Cal. 122; 51 Cal. 531.

Deemed to have accrued—see sec. 312*n*.

§ 345. The limitations prescribed in this chapter apply to actions brought in the name of the State, or for the benefit of the State, in the same manner as to actions by private parties.

Action by people—sec. 315.

§ 346. An action to redeem a mortgage of real property with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage.

Mortgage, redemption—see LIMITATIONS GENERALLY, sec. 312*n*.

Redemption, generally—sec. 701, *et seq.*

§ 347. If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action, under the provisions of this chapter, any one of them, who is entitled to maintain such an action, may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits, proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises.

See notes to last section.

§ 348. To actions brought, to recover money or other property deposited with any bank, banker, trust company, or savings and loan society, there is no limitation. [In effect July 1st, 1874.]

Deposits, generally—see ENTRUSTED PROPERTY, sec. 312*n*.

CHAPTER IV,
**GENERAL PROVISIONS AS TO THE TIME
 OF COMMENCING ACTIONS.**

- 350. When an action is commenced.
- 351. Exception, where defendant is out of the State.
- 352. Exception as to persons under disabilities.
- 353. Provision where person entitled dies before limitation expires.
- 354. In suits by aliens, time of war to be deducted.
- 355. Provision where judgment has been reversed.
- 356. Provision where action is stayed by injunction.
- 357. Disability must exist when right of action accrued.
- 358. When two or more disabilities exist, etc.
- 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed.
- 360. Acknowledgment or new promise must be in writing.
- 361. Limitation laws of other States, effect of.
- 362. Existing causes of action not affected.
- 363. "Action" includes a special proceeding.

§ 350. An action is commenced, within the meaning of this title, when the complaint is filed.

Action commenced—19 Cal. 577; 21 Cal. 351, 367; 34 Cal. 166; 35 Cal. 122.

Amended complaint—not referred to, 50 Cal. 525; 53 Cal. 102.

Issuance of summons—no longer commencement of action, in general, see secs. 406, 839; formerly, 19 Cal. 577.

§ 351. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

When cause of action accrues—sec. 312*n*.

Absence—must be alleged, 51 Cal. 264.

Return—16 Cal. 93.

Successive absences—44 Cal. 280.

Foreign corporation—50 Cal. 258.

Generally—6 Cal. 430; 43 Cal. 185.

§ 352. If a person entitled to bring an action, mentioned in chapter three of this title, be at the time the cause of action accrued, either—

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action;

The time of such disability is not a part of the time limited for the commencement of the action.

Disability—secs. 312*n*, 1805, 1806.

Infant—sec. 326*n*.

Insane person—27 Cal. 384.

Married woman—sec. 328*n*, 36 Cal. 447; 50 Cal. 303.

§ 353. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within six months from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Substitution of parties—sec. 385.

Two clauses of section—distinguished, 35 Cal. 645.

Action by representatives—34 Cal. 568; 35 Cal. 634.

Actions against representatives—10 Cal. 336; 19 Cal. 85, 97; 50 Cal. 64.

Shortening limitation—not designed, 19 Cal. 86; 50 Cal. 646.

Mortgage notes—various, which barred, 53 Cal. 375.

§ 354. When a person is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

§ 355. If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal.

§ 356. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Statutory prohibition—bankruptcy, see *Hoff v. Funkenstein*, March 1st, 1880.

§ 357. No person can avail himself of a disability, unless it existed when his right of action accrued.

Accruing of cause of action—sec. 312*n*.

§ 358. When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until they are removed.

See note to last section.

§ 359. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

Corporation stockholders—45 Cal. 110.

§ 360. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.

Part payment—not enough, 18 Cal. 482; 21 Cal. 142, 495; 22 Cal. 100.

Written acknowledgment—necessary, 5 Cal. 59; 17 Cal. 574; 21 Cal. 149; 36 Cal. 184, 192; 50 Cal. 235, 547.

Renewal of contract—generally, 9 Cal. 89; 25 Cal. 292; 39 Cal. 434.

Loan barred—51 Cal. 215.

Renewal of note—does not renew mortgage; *Wells v. Harter*, March 19th, 1880.

§ 361. When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.

Other States—6 Cal. 430.

§ 362. This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of this section.

Repeal of Limitations—see secs. 9, 18.

§ 363. The word "action," as used in this title, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

TITLE III.

OF THE PARTIES TO CIVIL ACTIONS.

- § 367. Action to be in name of party in interest.
- § 368. Assignment of thing in action not to prejudice defense.
- § 369. Executor, trustee, etc., may sue without joining the persons beneficially interested.
- § 370. When a married woman is a party—actions by and against.
- § 371. Wife may defend, when.
- § 372. Infant to appear by guardian.
- § 373. Guardian, how appointed.
- § 374. Unmarried female may sue, for her own seduction.
- § 375. Father, etc., may sue, for seduction of daughter, etc.
- § 376. Father, etc., may sue, for injury or death of child.
- § 377. When representatives may sue for death of one caused by the wrongful act of another.
- § 378. Who may be joined as plaintiffs.
- § 379. Who may be joined as defendants.
- § 380. Parties defendant in an action to determine conflicting claims to real property.
- § 381. Parties holding title under a common source, when may join.
- § 382. Parties in interest, when to be joined. When one or more may sue or defend for the whole.
- § 383. Plaintiff may sue in one action the different parties to commercial paper.
- § 384. Tenants in common, etc., may sever in bringing or defending actions.
- § 385. Action, when not to abate by death, marriage or other disability. Proceedings in such case.
- § 386. Another person may be substituted for the defendant.
- § 387. Intervention, when it takes place and how made.
- § 388. Associates may be sued by name of association.
- § 389. Court, when to decide controversy or to order other parties to be brought in.

§ 367. Every action must be prosecuted in the name of the real party in interest, except as provided in section three hundred and sixty-nine of this Code. [In effect April 15th, 1880.]

REAL PARTY IN INTEREST.

Assignees—sec. 368.

Beneficiary—37 Cal. 537; 46 Cal. 269; 49 Cal. 518.

Bonds—7 Cal. 551; 10 Cal. 347; 13 Cal. 588; 15 Cal. 9; 28 Cal. 540; 29 Cal. 194.

Choses in action—9 Cal. 325; 12 Cal. 97; 14 Cal. 403; 18 Cal. 126; 22 Cal. 187; 27 Cal. 249; 29 Cal. 150; 31 Cal. 240; 35 Cal. 345.

Corporations—26 Cal. 634; 33 Cal. 324.

Cotenants—sec. 381.

Counties—see Political Code, secs. 4000-4003; Penal Code, sec. 1570; 30 Cal. 623; 32 Cal. 148; 44 Cal. 153, 157.

- Defendants**—see under PARTIES GENERALLY, *infra*.
Devisees—sec. 1452.
Eminent domain—sec. 1237.
Errors and defects—sec. 475.
Executors, etc.—sec. 369; also see secs. 1352, 1452, 1581-1583.
Foreclosure—sec. 726n.
Generally—6 Cal. 247; 7 Cal. 551; 9 Cal. 325; 10 Cal. 347; 18 Cal. 126, 146; 22 Cal. 356, 430; 26 Cal. 122; 29 Cal. 19; 33 Cal. 121; 35 Cal. 596.
Heirs—sec. 1452.
Insurance—abandoned, 6 Cal. 462.
Owner—32 Cal. 232.
People—29 Cal. 213; 34 Cal. 679; 36 Cal. 605; 38 Cal. 565; 40 Cal. 158, 499; 45 Cal. 7; 50 Cal. 561; 52 Cal. 171; 53 Cal. 644; also see Political Code, sec. 4457.
Plaintiffs—see under PARTIES GENERALLY, *infra*.
Private person—43 Cal. 229; 45 Cal. 199.
Privity—1 Cal. 50.
Receivers—sec. 564 *et seq.*
Torts—5 Cal. 456; 22 Cal. 139, 173; 32 Cal. 590.
Trustees—sec. 369.

PARTIES GENERALLY.

Adding—sec. 389. **Administrator**—sec. 369. **Assignment**—sec. 368n. **Association**—business, sec. 388. **Bills of exchange**—sec. 383. **Death**—secs. 376, 377, 385n. **Defendants**—sec. 379. **Disability**—sec. 385. **Executor**—sec. 369. **Fictitious name**—designating by, sec. 474. **Guardian**—secs. 372n, 373, 375, 376n. **Infant**—sec. 372. **Injury**—sec. 376. **Insane or incompetent person**—secs. 372, 373, and notes. **Interpleader**—sec. 386. **Intervention**—sec. 387. **Joining all parties interested**—secs. 378, 379, 380, 381, 382, and note, 383, 384. **Married woman**—secs. 370, 371. **Notice of assignment**—sec. 368, and note. **Plaintiffs**—secs. 378, 382. **Promissory notes**—sec. 368 and note, 383. **Real party in interest**—sec. 367n. **Seduction**—secs. 374, 375. **Set-off**—sec. 368 and note. **Sureties**—sec. 383. **Trustee**—sec. 363. **Thing in action**—sec. 368n. **Transfer of interest**—sec. 385n.

§ 368. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity.

Assignment—Account, 7 Cal. 389. Appeal bond, 6 Cal. 87. Contract, 31 Cal. 241; 44 Cal. 295. Claim, on contract, 13 Cal. 62; 29 Cal. 154; for tort, 22 Cal. 142; for injury to realty, 32 Cal. 592. Counter-claim, 7 Cal. 548. Debt, as consideration for, 12 Cal. 92; 18 Cal. 82, 127; 21 Cal. 189. Generally, 5 Cal. 325; 19 Cal. 646; 20 Cal. 509. Judgment, 6 Cal. 87; 12 Cal. 181, 257; 22 Cal. 430; 23 Cal. 255, 596; 25 Cal. 539; 33 Cal. 525. Lease, Civil Code, secs. 822, 823. Pleading, 4 Cal. 229; 49 Cal. 347. Splitting demands, 7 Cal. 260; 8 Cal. 536.

Thing in action—defined, Civil Code, sec. 953. And see **CHOSSES IN ACTION**, sec. 367*n*.

Set-off—17 Cal. 290, 515; 21 Cal. 79.

Notice of assignment—6 Cal. 270; 20 Cal. 516; *Jones v. Chalfant*, March 15th, 1880.

Promissory notes—8 Cal. 280; 14 Cal. 94, 450.

§ 369. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

Executors and administrators—secs. 1452, 1561-3, 1589; 14 Cal. 117; 15 Cal. 259; 16 Cal. 579; 18 Cal. 11; 23 Cal. 16.

Trustee—1 Cal. 76, 94; 4 Cal. 197; 18 Cal. 11; 25 Cal. 29; 26 Cal. 25; 32 Cal. 111; 34 Cal. 136.

§ 370. When a married woman is a party, her husband must be joined with her, except:

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone;

2. When the action is between herself and her husband, she may sue or be sued alone;

3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone. [In effect July 1st, 1874.]

Separate property—15 Cal. 306; 19 Cal. 123; 31 Cal. 333; 32 Cal. 90; 36 Cal. 447.

Sole traders—sec. 1811 *et seq.*

Homestead—5 Cal. 504; 6 Cal. 71; 8 Cal. 66, 74, 347; 9 Cal. 96; 10 Cal. 26; 14 Cal. 506.

Between herself and husband—3 Cal. 321.

Living separate—abandonment, 49 Cal. 34, 308.

Foreclosure—53 Cal. 456.

Scope of section—generally, 3 Cal. 83, 312; 9 Cal. 321; 15 Cal. 311; 17 Cal. 578; 18 Cal. 336, 526; 22 Cal. 457; 35 Cal. 214; 38 Cal. 230; 42 Cal. 406; 46 Cal. 126; 53 Cal. 456.

§ 371. If a husband and wife be sued together the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.

Wife defending—5 Cal. 387; 9 Cal. 315.

§ 372. When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court

in which the action is pending in each case. A guardian *ad litem* may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. [In effect April 15th, 1880.]

Infant—19 Cal. 210, 629; 31 Cal. 274; 32 Cal. 111.

Minor—rights and liabilities of, Civil Code, secs. 41, 42.

Guardian of minor—secs. 1747-1759; 9 Cal. 638; 16 Cal. 504; 20 Cal. 676; 42 Cal. 484; and generally, see 32 Cal. 116, and secs. 373, 375, 376, 793, 795.

Insane or incompetent person—Civil Code, secs. 36, 38-41; guardian of, secs. 1763-1766.

§ 373. When a guardian *ad litem* is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant;

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or if under that age, or if he neglect so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action;

3. When an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding. [In effect April 15th, 1880.]

Guardian of minor—see note to last section.

Guardian of insane or incompetent person—sec. 372a.

§ 374. An unmarried female may prosecute, as plaintiff, in an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

Exemplary damages—see Civil Code, sec. 3294.

§ 375. A father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterward, and there be no loss of service.

Guardian *ad litem*—sec. 372; appointment of, sec. 373.

Guardian and ward—sec. 376a.

§ 376. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person. [In effect July 1st, 1874.]

Death—25 Cal. 434; and see sec. 377n.

Guardian and ward—secs. 1768-1776, and Civil Code, secs. 236-257.

§ 377. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just. [In effect July 1st, 1874.]

Maintaining action—before Codes, who could sue, 25 Cal. 435.

Damages—extent of, 34 Cal. 153; 44 Cal. 46; 45 Cal. 324; 43 Cal. 323.

§ 378. All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title.

Joinder of plaintiffs—see 5 Cal. 149; 8 Cal. 77, 514; 10 Cal. 302; 24 Cal. 12; 25 Cal. 242; 26 Cal. 337; 31 Cal. 420; 33 Cal. 437; 37 Cal. 34, 183.

Cotenants—sec. 381.

Special partners—Civil Code, sec. 2492.

Other parties—bringing in, sec. 389.

Misjoinder and non-joinder, generally—sec. 430n.

§ 379. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.

Second sentence of section—added by Code.

All interested or necessary parties—made defendants, sec. 382n; 1 Cal. 478; 12 Cal. 103; 14 Cal. 279; 17 Cal. 262, 467; 22 Cal. 200; 38 Cal. 514; 39 Cal. 379; 45 Cal. 263.

Equity cases—original section, limited to, 9 Cal. 268; but see 37 Cal. 389.

Ejectment—before Code, 4 Cal. 70; 6 Cal. 33; 9 Cal. 270; 11 Cal. 366; 2 Cal. 200; 28 Cal. 535; 32 Cal. 483; under Code, 53 Cal. 306.

Joining landlord—Civil Code, sec. 1949; 19 Cal. 632; 32 Cal. 493; 2 Cal. 393; 50 Cal. 250.

Foreclosure—sec. 726.

Corporation stockholders—Const. Cal. art. 12, secs. 3, 4; Civil Code, sec. 322.

Trusts—7 Cal. 92; 30 Cal. 455, 556.

Suits against the State—Const. Cal. art. 20, sec. 6. See, also, 6 Cal. 258; 7 Cal. 65.

Counties—as parties, see sec. 367*n*.

Executors—not qualifying, sec. 1587.

Defect of parties, etc.—sec. 430*n*.

Service on portion of defendants—sec. 414 and note.

Associates—suing by common name, sec. 388.

§ 380. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed. [In effect July 1st, 1874.]

Writ of possession—sec. 682*n*.

Additional parties—sec. 389.

Objections as to joinder—sec. 430*n*, and subd. 4.

§ 381. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same. [In effect July 1st, 1874.]

Cotenants, as several parties—sec. 384.

Joint tenants—before this enactment, 7 Cal. 347.

Tenants in common—before this enactment, 5 Cal. 149, 501; 8 Cal. 187; 12 Cal. 420; 16 Cal. 461; 17 Cal. 237; under this section, 15 Cal. 371; 20 Cal. 150; 21 Cal. 583; 30 Cal. 484.

Executors, etc.—joinder of, see secs. 1452, 1581 *et seq.*; 20 Cal. 620; 21 Cal. 202; 45 Cal. 631.

Replevin—by tenant in common, see replevin, sec. 426*n*.

Connected interest—24 Cal. 177.

§ 382. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Generally—see 16 Cal. 145; 27 Cal. 50; 44 Cal. 322.

All parties interested—joining, 26 Cal. 330; 31 Cal. 427; 52 Cal. 463; 53 Cal. 33.

Refusal to join as plaintiff—6 Cal. 506; 18 Cal. 322.

Common or general interest—1 Cal. 55; 7 Cal. 330; 21 Cal. 632.

Parties, numerous—joinder impracticable, 1 Cal. 68; 14 Cal. 540.

Joinder—errors as to, sec. 430*n*.

§ 383. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

See secs. 414, 578, 579; 6 Cal. 176; 25 Cal. 520; 29 Cal. 429; 48 Cal. 234.

§ 384. All persons holding as tenants in common, joint tenants or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

Co-claimants—uniting as plaintiffs, sec. 381.

Mining claim—error as to joinder of tenants in common, 52 Cal. 263.

§ 385. An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. [In effect July 1st, 1874.]

Construction of section—51 Cal. 153.

Substitution—of representatives or successors, 5 Cal. 281; 20 Cal. 68; 29 Cal. 359; 31 Cal. 333; 32 Cal. 493; 49 Cal. 347; 53 Cal. 3; Ex parte Tinkum, Feb. 24th, 1880; Jordan v. Hubert, March 4th, 1880.

Death—suggestion of, 13 Cal. 591; 21 Cal. 445; Judson v. Love, 35 Cal. 463; 40 Cal. 96; 44 Cal. 284; 45 Cal. 337.

CODE CIV. PROC.—128.

Appeal—effect of death or disability on, sec. 53*n*, and sec. 129; Supreme Ct. rule 14.

Attachment—death dissolves, 29 Cal. 367; 47 Cal. 622; 50 Cal. 365

Transfer of interest—sec. 740; 29 Cal. 446; 30 Cal. 467; 24 Cal. 99; 37 Cal. 388; 46 Cal. 575; 49 Cal. 203, 347; 54 Cal. 386.

Survival—of cause of action: Ejectment, 50 Cal. 655.

§ 386. A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another. [In effect March 3rd, 1881.]

Interpleader—8 Cal. 592.

§ 387. Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. [In effect July 1st, 1874.]

Intervention—5 Cal. 281, 504; 6 Cal. 256, 376; 7 Cal. 35; 8 Cal. 570; 10 Cal. 227, 296; 13 Cal. 62; 14 Cal. 165; 18 Cal. 378; 21 Cal. 280, 441; 23 Cal. 21, 293; 29 Cal. 150, 673; 37 Cal. 532; 38 Cal. 608; 43 Cal. 161; 44 Cal. 161; 47 Cal. 602; 51 Cal. 559, 629; 52 Cal. 509; 53 Cal. 3, 742.

Eminent domain—intervention in, sec. 1246.

Complaint—generally, see sec. 426, and notes.

Demurrer—sec. 430.

Answer—sec. 437.

§ 388. When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the commons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability.

Business associates—common name, sec. 414; 3 Cal. 247; 5 Cal. 246; 11 Cal. 445; 22 Cal. 356; 30 Cal. 204; 39 Cal. 93. See also, *Martin v. Risling*, 3 Pac. Coast Law J. 56.

Mining company—*Welsh v. Kirkpatrick*, 30 Cal. 202.

§ 389. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

Fresh parties—bringing in, 5 Cal. 114, 281; 9 Cal. 96, 697; 12 Cal. 213; 13 Cal. 206; 27 Cal. 329; 30 Cal. 490; 38 Cal. 514; 44 Cal. 392; *Sherman v. McCarthy*, March 3rd, 1880.

All parties interested—should be brought in, 53 Cal. 38. Also, see sec. 382a.

Joining landlord—sec. 379.

Party, adding and amending name of—sec. 473; 1 Cal. 192; 3 Cal. 235; 7 Cal. 567; 9 Cal. 53; 49 Cal. 270.

. TITLE IV.

Of the Place of Trial of Civil Actions.

- § 392. Certain actions to be tried where the subject or some part thereof is situated.
- § 393. Other actions, where the cause or some part thereof arose.
- § 394. Place of trial of actions against counties.
- § 395. Other actions according to the residence of the parties.
- § 396. Action may be tried in any county, unless the defendant demand a trial in the proper county.
- § 397. Place of trial may be changed in certain cases.
- § 398. When judge is disqualified, cause to be transferred.
- § 399. Papers to be transmitted. Costs, etc. Jurisdiction, etc.
- § 400. Proceedings after judgment in certain cases transferred.

§ 392. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this Code:

1. For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property;

2. For the partition of real property;

3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action. [In effect March 2nd, 1876.]

Commencement—of actions as to real estate, see sec. 78.

Local action—in general, 5 Cal. 461; 9 Cal. 642; 13 Cal. 321; 15 Cal. 220; 18 Cal. 432; 51 Cal. 566.

Two counties—*O'Neil v. O'Neil*, Feb. 20th, 1880.

Riot—injuries by, see Political Code, sec. 4453.

Partition—generally, sec. 752 *et seq.*

Foreclosure—sec. 726.

VENUE GENERALLY.

Action—as to real estate, where commenced, sec. 332n.

Bias—of judge, sec. 397n, and subd. 4.

Change of—affidavit for, demand for, motion for, 396n; grounds of, sec. 397 and notes; generally, see same.

Convenience—of witnesses, sec. 397n, and subd. 3.

Counties—actions against or between, sec. 394.

Impartial trial—no, sec. 397n, and subd. 2.

Local actions—sec. 392a, sec. 393.

Officer—action against, sec. 393, subd 2.

Penalty—or forfeiture, statutory, sec. 393, subd. 1.

Real property—actions concerning, sec. 392.

Residence—of defendants, sec. 395.

Transfer—of case, secs. 398-400.

Transitory actions—sec. 395.

Two counties—sec. 392a; sec. 393, subd. 1.

Wrong county—sec. 396; 397, subd 1.

§ 393. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute; except that, when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed;

2. Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, does anything touching the duties of such officer.

Act done by public officer—9 Cal. 420. Local action—sec. 392a.

§ 394. An action against a county, or city and county, may be commenced and tried in such county, or city and county, unless such action is brought by a county, or city and county, in which case it may be commenced and tried in any county, or city and county, not a party thereto. [In effect March 3rd, 1881.]

§ 395. In all other cases, the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action; or, if none of the defendants reside in the State, or, if residing in this State, and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the State, such action may be tried in any county where either of the parties reside, or service is had; subject, however, to the power of the court to change the place of trial as provided in this Code.

County where defendants reside—15 Cal. 418.

Residence of corporation—22 Cal. 537.

§ 396. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.

Motion—time of making, 3 Cal. 433; 5 Cal. 117; 9 Cal. 643; 28 Cal. 247; 38 Cal. 560.

Affidavit of merits—*Johnson v. Hyman*, Jan. Term, 1875, not reported.

Demand—does not mean notice of motion, *Estrada v. Orena*, March 3rd, 1880.

§ 397. The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county;
2. When there is reason to believe that an impartial trial cannot be had therein;
3. When the convenience of witnesses, and the ends of justice would be promoted by the change;
4. When from any cause the judge is disqualified from acting.

Change of venue—generally, 9 Cal. 607, 642; 15 Cal. 418; 22 Cal. 127; 29 Cal. 245; 32 Cal. 208; 37 Cal. 190; 46 Cal. 246.

Appeal—from order as to change of venue, sec. 939, subd. 3.

Not the proper county—13 Cal. 321; 22 Cal. 537; 47 Cal. 192.

Impartial trial—unlikely, 3 Cal. 410; 6 Cal. 555; 23 Cal. 378; 46 Cal. 248.

Convenience of witnesses—15 Cal. 418; 47 Cal. 192; 48 Cal. 460; 49 Cal. 454.

Bias of judge—secs. 1431, 1432; 12 Cal. 500; 23 Cal. 168, 592; 24 Cal. 31, 75; 53 Cal. 251.

§ 398. If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if, from any cause, the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon, by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows:

1. If in a Superior Court, to another Superior Court.
2. If in a Justice's Court, to another Justice's Court in the same county.

[In effect March 3rd, 1881.]

Superseded courts—sec. 762.

§ 399. When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleadings and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

§ 400. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the record of the court, briefly designating it as a judgment transferred from ——— court (naming the proper court).

TITLE V.

Of the Manner of Commencing Civil Actions.

- § 405. Actions, how commenced.
- § 406. Complaint, how indorsed. When summons may be issued, and how waived.
- § 407. Summons, how issued, directed, and what to contain.
- § 408. Alias summons.
- § 409. Notice of the pendency of an action affecting the title to real property.
- § 410. Summons, how served and returned.
- § 411. Summons, how served.
- § 412. Publication when defendant is absent from the State, concealed, or a foreign corporation having no agent, etc.
- § 413. Manner of publication and appointment of attorney.
- § 414. Proceedings where there are several defendants, and part only are served.
- § 415. Proof of service, how made.
- § 416. When jurisdiction of action acquired.

§ 405. Civil actions in the courts of this State are commenced by filing a complaint. [In effect July 1st 1874.

Commencement—generally, 4 Cal. 280; 10 Cal. 374; 21 Cal. 351; 29 Cal. 238; 34 Cal. 165. Demand before, pleading, sec. 426*n*. Pendency of action from, sec. 1049.

Issuance of summons—embraced before Amdt. 1874, 18 Cal. 639; 1 Cal. 577. Compare as to LIMITATIONS, sec. 350 and note.

§ 406. The clerk must indorse on the complaint the day, month, and year that it is filed; and at any time within one year thereafter, the plaintiff may have a summons issued; and if the action be brought against two or more defendants, who reside in different counties, may have a summons issued for each of such counties at the same time. But at any time within the year after the complaint is filed, the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year, at any time before trial. [In effect July 1st, 1874.]

One year—mandatory, 53 Cal. 245; no definite period before Amdt. 1860, 35 Cal. 300.

Delay—as to issuance of summons, 35 Cal. 296; as to service of summons, see sec. 410*n*. Want of prosecution, generally, sec. 504*n*.

Summons—issuance of, generally, 34 Cal. 166; 36 Cal. 585. Waiver of issuance, 4 Cal. 231. See ADMISSION, sec. 415; APPEARANCE, sec. 414; CONSENT, sec. 283*n*.

Clerk's indorsement—as to ministerial officers generally, see sec. 414.

Libel and slander suits—Security for beginning, see Stats. 1871-72, p. 533.

Appearance—secs. 476, 1014.

Alias summons—sec. 408.

Residence of defendants—In different counties, see sec. 78 as to process.

Joint contract—see sec. 414.

SUMMONS GENERALLY.

Alias—sec. 408.

Amendment of—sec. 473*n*.

Commencement of action—not element of, sec. 406*n*.

Contents of—sec. 407*n*.

Defendants—see SEVERAL DEFENDANTS.

Delay—sec. 410*n*.

Issuance of—secs. 405*n*, 406 and note.

Jurisdiction—by service, sec. 416 and note.

Libel and slander—security for suit, sec. 406*n*.

In pendency—sec. 409.

Person—authorized to serve, sec. 410 and note.

Publication—service by, secs. 412, 413, and notes.

Proof of service—secs. 410, 415, and notes.

Service of—proof, *supra*; by publication, *supra*; mode of, sec. 411 and notes; also sec. 410, COPY COMPLAINT, note; by whom made, see PERSON, *supra*; setting aside, 416*n*.

Several defendants—part served, sec. 414 and note; extra time for service, sec. 406.

407. The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain:

1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed;

2. A statement of the nature of the action in general terms;

3. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days, if served elsewhere;

4. In an action arising on contract, for the recovery of money or damages only, a notice that unless the defend-

ant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint (stating it);

5. In other actions, a notice that unless defendant appears and answers, the plaintiff will apply to the court for the relief demanded in the complaint. The name of the plaintiff's attorney must be indorsed on the summons. [In effect March 26th, 1880.]

Process—generally, see sec. 78*n*.

Style of process—Const. Cal. art. 6, sec. 20; Political Code, sec. 20.

Title of court—3 Cal. 192.

Contents of summons—SUBD. 1, Parties, 44 Cal. 630. SUBD. 2, Character of action, 28 Cal. 151; 41 Cal. 314; 52 Cal. 578. SUBD. 3, Time to appear, 1 Cal. 416; 5 Cal. 62, 466; and particularly see 44 Cal. 355. SUBD. 4, Notice for money default, 2 Cal. 241. SUBD. 5, Notice of application for relief demanded, 8 Cal. 619; 53 Cal. 253; generally, 2 Cal. 153; 7 Cal. 684; 18 Cal. 420.

Abbreviations, etc.—sec. 186.

Amendments—sec. 473.

§ 408. If the summons is returned without being served on any or all of the defendants, or if it has been lost, the clerk, upon the demand of the plaintiff, may issue an alias summons, in the same form as the original. [In effect February 15th, 1876.]

Alias summons—not too late, 48 Cal. 464; and for delay as to summons, generally, see sec. 410*n*; when unnecessary, 40 Cal. 572.

§ 409. In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may record in the office of the recorder of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. [In effect July 1st, 1874.]

Lis pendens—13 Cal. 307, 591; 15 Cal. 263; 17 Cal. 149; 18 Cal. 102, 285; 21 Cal. 107; 22 Cal. 200; 23 Cal. 38, 355, 409; 24 Cal. 427; 27 Cal. 50; 28 Cal. 194; 34 Cal. 611; 35 Cal. 390; 43 Cal. 253, 643; 51 Cal. 478.

Alienation—by person in possession, sec. 747.

Partition—recording notice of suit, sec. 755.

§ 410. The summons may be served by the sheriff of the county where the defendant is found, or by any other

person, over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. When the summons is served by the sheriff, it must be returned, with his certificate of its service, and of the service of any copy of the complaint, where such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint, where such copy is served. [In effect July 1st, 1874.]

Service of summons—manner of, sec. 411 and notes.

Proof of service—sec. 415.

Copy of complaint—essential, 11 Cal. 372; 28 Cal. 153; 35 Cal. 279; 41 Cal. 24. Certified, formerly had to be, 51 Cal. 615. Single, when sufficient, 53 Cal. 737.

Who may serve—sheriff's deputy, not as such, 5 Cal. 449. Any outside person, 31 Cal. 246. Who could serve formerly, 34 Cal. 391. In Justices' Courts, sec. 849.

Sheriff's return—sec. 415, subd. 1, note.

Affidavit—sec. 415a.

Setting aside service—sec. 414a.

Service after return—40 Cal. 572.

Delay—in serving summons, 29 Cal. 233; 36 Cal. 585; 39 Cal. 450; 45 Cal. 6; 47 Cal. 614; 43 Cal. 464; in issuing summons, sec. 406a; in prosecution, generally, sec. 594a.

§ 411. The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this State, to the president or other head of the corporation, secretary, cashier, or managing agent thereof;

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary within this State, to such agent, cashier, or secretary;

3. If against a minor under the age of fourteen years, residing within this State, to such minor, personally, and also to his father, mother, or guardian; or, if there be none within this State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed;

4. If against a person residing within this State, who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a

guardian has been appointed, to such person and also to his guardian;

5. If against a county, city or town, to the president of the board of supervisors, president of the council, of trustees, or other head of the legislative department thereof;

6. In all other cases, to the defendant personally. [In effect July 1st, 1874.]

Mode of service—statute the guide, 11 Cal. 372; 43 Cal. 385; on sheriff, Political Code, secs. 4190-4192; by telegraph, sec. 1017; generally, 3 Cal. 616; 42 Cal. 484.

SUBDIVISIONS 1, 2. Corporations—6 Cal. 185; 10 Cal. 342, 444; 41 Cal. 616. **Association**—business, sec. 388 and notes.

SUBDIVISION 3. Minor—father suing, before Code, 51 Cal. 615; guardian of, sec. 372.

SUBDIVISION 4. Insane or incompetent person—guardian of, sec. 372; where no guardian, 53 Cal. 737.

SUBDIVISION 5. Counties as parties—see **REAL PARTY IN INTEREST**, sec. 367*n*.

SUBDIVISION 6. Personal service—mode of, 16 Cal. 386; on attorney-in-fact, 45 Cal. 455.

§ 412. Where the person on whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or is a foreign corporation, having no managing or business agent, cashier, or secretary within the State, and the fact appears by affidavit to the satisfaction of the court or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons. [In effect March 26th, 1880.]

Section generally—4 Cal. 304; 6 Cal. 201; 8 Cal. 449; 12 Cal. 583; 34 Cal. 641; 47 Cal. 144.

SERVICE BY PUBLICATION.

Affidavit—for, 12 Cal. 285; 23 Cal. 85; 26 Cal. 149; 30 Cal. 611; 31 Cal. 342; 47 Cal. 144; 50 Cal. 498.

Order—for, sec. 413; cannot direct issuance of summons, 20 Cal. 81.

Supplemental complaint—27 Cal. 300.

Fictitious person—against, 45 Cal. 689.

Justice's Court—expressly applied to, sec. 849.

Jurisdiction—see sec. 33*n*.

Non-resident—against, personal judgment on, 53 Cal. 635.

Constitutionality—9 Cal. 111; 39 Cal. 439; 44 Cal. 359. But see *Belcher v. Chambers*, 53 Cal. 635.

Direct attack—strict construction on, 12 Cal. 100; 47 Cal. 145.

Collateral attack—favorable construction as to Superior Courts, 23 Cal. 530; *Hahn v. Kelly*, 34 Cal. 391; 37 Cal. 458; 44 Cal. 359; 49 Cal. 374, and see INTENDMENTS, sec. 53*n*. Strict construction, 27 Cal. 300; 31 Cal. 342; 50 Cal. 502; *Belcher v. Chambers*, 53 Cal. 635, overruling *Hahn v. Kelly*, *supra*.

§ 413. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months. In case of publication, where the residence of a non-resident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post-office, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication. [In effect July 1st, 1874.]

Section generally—5 Cal. 465; 9 Cal. 107, 616; 26 Cal. 149; 45 Cal. 30; applicable to Justice's Court, sec. 849.

Designated newspaper—23 Cal. 85.

Period of publication—12 Cal. 100; 31 Cal. 173; 32 Cal. 347.

Publication on Sundays—32 Cal. 347.

Proof of publication—sec. 415, subd. 3*n*.

Completion of publication—time to answer after, 5 Cal. 465; judgment by default, sec. 585, subd. 3.

§ 414. When the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

Section generally—see secs. 579, 989; also, secs. 333, 338, and 3 Cal. 55, 6 Cal. 176, 607; 7 Cal. 443; 12 Cal. 351; 13 Cal. 558; 17 Cal. 564; 18 Cal. 30, 402; 29 Cal. 429; 30 Cal. 534; 35 Cal. 602; 39 Cal. 93.

Joint defendants—one served, 10 Cal. 511; *Tay v. Hawley*, 39 Cal. 93; *Kelly v. Bandini*, 50 Cal. 530; as to partners, see sec. 388; 2 Cal. 89; 51 Cal. 184.

§ 415. Proof of the service of summons and complaint must be as follows:

1. If served by the sheriff, his certificate thereof;
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or

CODE CIV. PROC.—13.

his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited; or,

4. The written admission of the defendant in case of service otherwise than by publication; the certificate or affidavit must state the time and place of service.

Return of service of summons—intendments as to, see sec. 53a; sufficiency on collateral attack, 34 Cal. 391; 45 Cal. 455; 51 Cal. 615.

SUBDIVISION 1. Sheriff's certificate—3 Cal. 266; 5 Cal. 449; 6 Cal. 85; 23 Cal. 401; 45 Cal. 455; sheriff's return, generally, sec. 683a.

SUBDIVISION 2. Affidavit—11 Cal. 372; 28 Cal. 152.

SUBDIVISION 3. Affidavit of publication—23 Cal. 85; 27 Cal. 295; 33 Cal. 505; proof of publication, generally, secs. 2010, 2011.

SUBDIVISION 4. Admission of service—9 Cal. 321; 11 Cal. 307; 35 Cal. 528. Time and place—3 Cal. 192; 6 Cal. 295; 28 Cal. 153. Setting aside service—50 Cal. 185. Section in general—7 Cal. 279; 9 Cal. 616; 31 Cal. 238; 34 Cal. 403, 612; 37 Cal. 458; 43 Cal. 385.

§ 416. From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him. [In effect July 1st, 1874.]

An act concerning service of summons upon absent defendants by publication, approved March 15th, 1872, is repealed. [In effect March 20th, 1874.]

Section generally—7 Cal. 62, 584; 30 Cal. 439; 34 Cal. 391, 579; 40 Cal. 640; 41 Cal. 41.

Admission of service—sec. 415.

Appearance—sec. 1014.

Waiver of summons—sec. 406.

Jurisdiction—generally, sec. 33a; acquired how, *Ibid.*; of the person, *Ibid.*

TITLE VI.

Of the Pleadings in Civil Actions.

- CHAP. I. The pleadings in general.
- II. The complaint.
- III. Demurrer to the complaint.
- IV. The answer.
- V. Demurrer to answer.
- VI. Verification of pleadings.
- VII. General rules of pleading.
- VIII. Variance—Mistakes in pleadings and amendments.

CHAPTER I.

THE PLEADINGS IN GENERAL.

§ 420. Definition of pleadings.

§ 421. This Code prescribes the form and rules of pleadings.

§ 422. What pleadings are allowed.

§ 420. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

§ 421. The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this Code.

One form of action—sec. 307 and note.

Forms of pleading—10 Cal. 558; 17 Cal. 497.

General rules of pleading—sec. 452 *et seq.*

Abolition of old systems—12 Cal. 147; 31 Cal. 158.

CODE PLEADING.

Leading cases—10 Cal. 22; Green v. Palmer, 15 Cal. 414; 16 Cal. 243; 32 Cal. 450; 37 Cal. 250; Haskell v. Haskell, March 5th, 1880.

Forms adopted—14 Cal. 82; 24 Cal. 463; and see secs. 407, 421.

Abbreviations and numerals—sec. 186.

Rules—sec. 452 *et seq.*; 15 Cal. 415.

Liberal construction—secs. 452, 473, 475.

Fictions—disapproved, 16 Cal. 243; 22 Cal. 570.

Common counts—see INDEBITATUS ASSUMPSIT, sec. 426n.

Ordinary language—16 Cal. 244.

Conciseness—required, 15 Cal. 418; in complaint, sec. 426, subd. 2.

Repetition—forbidden, 15 Cal. 418.

Facts, allegation of—*Solely and wholly*, 2 Cal. 86, 256, 468; 3 Cal. 121, 205, 229; 9 Cal. 615; 10 Cal. 555; 14 Cal. 459; 15 Cal. 414, 415; 30 Cal. 320; 39 Cal. 539; 42 Cal. 475; 43 Cal. 522; 45 Cal. 616; 50 Cal. 298; and see, as to complaint, INDEBITATUS ASSUMPSIT, sec. 426n. *Material only*, sec. 463; 15 Cal. 416; 19 Cal. 476. *Ultimate, not probative*, 6 Cal. 171; 11 Cal. 166, 168; 15 Cal. 417; 16 Cal. 244, 577; 22 Cal. 566; 23 Cal. 165; 31 Cal. 271; 32 Cal. 455; 39 Cal. 317; 47 Cal. 488; 48 Cal. 450; Harris v. Hillegass, March 30th, 1880; Conner v. Bludworth, April 26th, 1880.

Time—39 Cal. 74; 40 Cal. 355; 44 Cal. 299.

Law, conclusions of—not to be averred, 12 Cal. 534; 15 Cal. 414, 415; 21 Cal. 119; 29 Cal. 453; 31 Cal. 72, 271; 44 Cal. 264; 46 Cal. 17; 51 Cal. 210; but see 34 Cal. 46; 47 Cal. 488; and see INDEBITATUS ASSUMPSIT under COMPLAINT IN PARTICULAR CASES, sec. 426n.

§ 422. The only pleadings allowed on the part of the plaintiff are—

1. The complaint;
2. The demurrer to the answer.

And on the part of the defendant—

1. The demurrer to the complaint;
2. The answer.

Under Practice Act—49 Cal. 301.

CHAPTER II.

THE COMPLAINT.

- § 425. Complaint, first pleading.
 § 426. Complaint, what to contain.
 § 427. What causes of action may be joined.

§ 425. The first pleading on the part of the plaintiff is the complaint.

§ 426. The complaint must contain—

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;
2. A statement of the facts constituting the cause of action, in ordinary and concise language;
3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

Complaint, generally—see CODE PLEADING, sec. 421*n*.

CONTENTS OF COMPLAINT.

SUBDIVISION 1. Title—defective, sec. 1046. Court—see 3 Cal. 195. Venue—generally, secs. 392-400. Parties—generally, secs. 367-369; names of, secs. 388, 474; 13 Cal. 75; and see 44 Cal. 630.

SUBDIVISION 2. Facts—how alleged, see CODE PLEADING, sec. 421*n*. Concise and ordinary language—see CODE PLEADING, sec. 421*n*.

SUBDIVISION 3. Relief—sec. 580*n*. Damages—see COMPLAINT IN PARTICULAR CASES, *infra*, and sec. 657, subd. 5*n*. Cross-complaint—sec. 442.

COMPLAINT, IN PARTICULAR CASES.

Account—Items, omitting, sec. 454; stated, 9 Cal. 360; and see 13 Cal. 427. Accounting—suit for, 17 Cal. 178; Quackenbush v. Sawyer, March 29th, 1880; in partnerships, 2 Cal. 86; 3 Cal. 294; 4 Cal. 320; 6 Cal. 574; 35 Cal. 434; 43 Cal. 11; 48 Cal. 171; 50 Cal. 77. Administrator—6 Cal. 393; 10 Cal. 559; 12 Cal. 314; 28 Cal. 182; 38 Cal. 21; 50 Cal. 456; see, also, secs. 377, 1582. Amendment—sec. 473*n*; also see secs. 432, 472. Assessment, street—see TAXES. Assignee—of bankrupt, 48 Cal. 450; generally, see ASSIGNMENT, sec. 368*n*. Assumpsit—see INDEBITATUS ASSUMPSIT, and CONTRACT. Bond—4 Cal. 15; 30 Cal. 629; 52 Cal. 504. Common counts—see INDEBITATUS ASSUMPSIT. Contract—*Averment*, sec. 447-9; 26 Cal. 294, 302; 37 Cal. 253; 38 Cal. 603; 51 Cal. 210. *Breach*, 30 Cal. 570; 48 Cal. 472; 50 Cal. 520; 53 Cal. 461. *Conditions precedent*, sec. 457; 50 Cal. 350. *Consideration*—10 Cal. 461; 17 Cal. 101; 34 Cal. 147. *Frauds, Statute of*—29 Cal. 599; 43 Cal. 463, 509; 46 Cal. 267; 51 Cal. 210. *Implied, tort waived*, 3 Cal. 463; 12 Cal. 90; 18 Cal. 526; 22 Cal. 246; 35 Cal. 194; 43

Cal. 390, 496. *Money, for*, 50 Cal. 520. *Performance, of conditions precedent*, see that head; part, 52 Cal. 591; generally, 48 Cal. 472. *Wagering*, Penal Code, sec. 60; 43 Cal. 615. *Conversion*—42 Cal. 98; 50 Cal. 616; 52 Cal. 306; 53 Cal. 713; *Payne v. Elliot*, March 18th, 1880; and see *REPLEVIN*, and *TROVER*. *Corporations*—sec. 471; 5 Cal. 300; 9 Cal. 456; 11 Cal. 258; 37 Cal. 360, 541. *Damages*—averring generally, 1 Cal. 479; 19 Cal. 28; 22 Cal. 221; 41 Cal. 535; 50 Cal. 280; extent of claim, see 2 Cal. 256; 25 Cal. 306; 37 Cal. 283; 49 Cal. 627; and sec. 580; special, where, 1 Cal. 54; 1 Cal. 89; 10 Cal. 28; 28 Cal. 102; 30 Cal. 97; 34 Cal. 158; 38 Cal. 690; 41 Cal. 365; 47 Cal. 165. *Defect—curing*, sec. 473; 51 Cal. 175. *Demand—attorney*, by, 16 Cal. 77; averment of, see form of allegation of; conversion, 1 Cal. 160; 11 Cal. 303; 12 Cal. 495; 22 Cal. 164; 23 Cal. 360; 30 Cal. 300; 38 Cal. 583; 50 Cal. 367; deed, 25 Cal. 266; 47 Cal. 71; detention, unlawful, see conversion; ejection, 16 Cal. 90; 33 Cal. 290; 46 Cal. 538; extent of, 23 Cal. 370; form of allegation of, 22 Cal. 251; 38 Cal. 509; *land*, 36 Cal. 165; money claims, 6 Cal. 29; 7 Cal. 422; 22 Cal. 278; 23 Cal. 6; personal property, for, see conversion; promissory notes, 12 Cal. 62; 22 Cal. 278; 48 Cal. 150; 49 Cal. 467; 51 Cal. 239; stockholder, 39 Cal. 22; sureties, 15 Cal. 9; torts, see conversion; trustees, 40 Cal. 614; vendor's lien, 50 Cal. 23. *Detainer—unlawful*, sec. 1166; generally, secs. 1179-1179. *Divorce*—51 Cal. 543, and see under note to sec. 76 subd. 4. *Ejectment*—sec. 455; 15 Cal. 23; *Payne v. Treadwell*, 16 Cal. 223; 18 Cal. 63; 19 Cal. 113; 24 Cal. 260; 38 Cal. 216; 39 Cal. 585; 41 Cal. 595; 46 Cal. 8; 47 Cal. 21, 263; 48 Cal. 638; 50 Cal. 258, 603; as to DEMAND, see that head. *Eminent domain*—53 Cal. 223. *Equity*—see RELIEF, sec. 580n; 50 Cal. 16, 32, 422; and see SPECIFIC PERFORMANCE, TRUST. *Estoppel*—generally, sec. 1908n. *Executor*—see ADMINISTRATOR. *Fees—of sheriff*, 49 Cal. 421. *Forcible entry*—see DETAINER, UNLAWFUL. *Foreclosure*—setting aside, 49 Cal. 676; action generally, sec. 726. *Fraud*—facts setting forth, 7 Cal. 206; 10 Cal. 411; 21 Cal. 642; 23 Cal. 77; 24 Cal. 163; 30 Cal. 666; 35 Cal. 714; 37 Cal. 355; 39 Cal. 123; 50 Cal. 202; *Payne v. Elliott*, March 18th, 1880; combination for, 25 Cal. 556. *Goods sold to wife*, 53 Cal. 74; generally, see INDEBITATUS ASSUMPSIT. *Indebitatus assumpsit—sufficiency of count in*, 10 Cal. 337; 13 Cal. 171; 19 Cal. 330; *Wilkins v. Stidger*, 22 Cal. 232; *Abadie v. Carillo*, 32 Cal. 172; 33 Cal. 141; *De la Guerra v. Newhall*, May 15th, 1880; generally, 6 Cal. 10; 10 Cal. 337; 14 Cal. 147; 41 Cal. 19. *Indemnity—offer of*, 28 Cal. 562. *Injunction*—53 Cal. 416; preventive relief, generally, 580n; preliminary injunction, sec. 527, and generally, sec. 525 et seq. *Injury*—48 Cal. 409; 49 Cal. 460; 51 Cal. 116; also, see NEGLIGENCE. *Insurance—fire, ownership of policy*, 47 Cal. 416. *Intervention*—sec. 387. *Judgment—action on*, sec. 456; 12 Cal. 181; 28 Cal. 549; 41 Cal. 314; 50 Cal. 525; suit to set aside, 49 Cal. 676; gold coin, allegations for, sec. 667. *Landlord*—2 Cal. 515. *Libel*—sec. 460; 47 Cal. 207. *Malicious prosecution*—18 Cal. 81; 50 Cal. 115. *Mining stocks*—see cases under CONVERSION and SPECIFIC PERFORMANCE. *Mistake*—48 Cal. 276. *Money had and received*—33 Cal. 650. *Negligence*—3 Cal. 109; 48 Cal. 221, 409. *Parties*—generally, sec. 367 et seq. *Partnership suits*—see ACCOUNTING. *People*—by, 25 Cal. 242; and see under REAL PARTY IN INTEREST, sec. 375n. *Personal property—taking*, 49 Cal. 612; and see TROVER. *Promissory note*—28 Cal. 245; 32 Cal. 569; 35 Cal. 118; 36 Cal. 299; 43 Cal. 395; as to DEMAND, see that head. *Redeem—suit to*, 50 Cal. 549. *Reference—pleading by*, 50 Cal. 298. *Relief—limits of*, sec. 580 and notes. *Replevin*—47 Cal. 5. *Sheriff—against*, see FEES. *Slander*—sec. 460. *Specific performance*—50 Cal. 422; and generally, see SPECIFIC RELIEF, sec. 580n. *Statute*—3 Cal. 236; 9 Cal. 424, and see TAXES; pleading, generally, secs. 458, 459. *Successorship*—49 Cal. 347; and generally, see sec. 385. *Supplemental complaint*—sec. 464.

Taxes—49 Cal. 150, 623; 51 Cal. 217. **Tender**—53 Cal. 597. **Title**—quieting, 35 Cal. 30; 38 Cal. 679; 53 Cal. 395; and generally, see secs. 738, 1050. **Tort**—joint, 53 Cal. 654. **Trespass**—49 Cal. 617; 51 Cal. 303; 53 Cal. 141. **Trover**—48 Cal. 152; 49 Cal. 617; 50 Cal. 367, 616; *Payne v. Elliott*, March 18th, 1880. **Trust**—50 Cal. 107. **Usage of trade**—sec. 1870, subd. 12; 48 Cal. 209. **Vendor's lien**—8 Cal. 398. **Verification**—sec. 446. **Work and labor**—*Downing v. Graves*, April 8th, 1880.

§ 427. The plaintiff may unite several causes of action in the same complaint, where they all arise out of—

1. Contracts, express or implied;
2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;
3. Claims to recover specific personal property, with or without damages for the withholding thereof;
4. Claims against a trustee by virtue of a contract or by operation of law;
5. Injuries to character;
6. Injuries to person;
7. Injuries to property;

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.

Uniting causes of action—Generally—5 Cal. 224; 7 Cal. 133; 9 Cal. 642; 17 Cal. 261; 23 Cal. 197; *Wilson v. Castro*, 31 Cal. 428; 46 Cal. 189; 52 Cal. 171. *Stating separately*, 14 Cal. 146, 543; 15 Cal. 151; 18 Cal. 576; 23 Cal. 197. *Improper joinder*, and objection to, sec. 430, subd. 5; 31 Cal. 428; 50 Cal. 523; 51 Cal. 489; 52 Cal. 250.

SUBDIVISION 1. Contracts—10 Cal. 233, 299; 22 Cal. 457; 24 Cal. 379; 25 Cal. 266; 28 Cal. 105; 42 Cal. 245; 46 Cal. 270; 48 Cal. 478; 50 Cal. 632.

SUBDIVISION 2. Real property—4 Cal. 291; 5 Cal. 225; 14 Cal. 26; 15 Cal. 152.

SUBDIVISION 3. Replevin—generally, sec. 509 *et seq.*

SUBDIVISION 4. Trustees—28 Cal. 632.

SUBDIVISION 5. Libel or slander—pleading, sec. 460.

SUBDIVISION 6. Personal injuries—4 Cal. 27.

SUBDIVISION 7. Injuries to property—3 Cal. 440; 12 Cal. 555; 32 Cal. 585, 590; 43 Cal. 180.

CHAPTER III.

DEMURRER TO THE COMPLAINT.

- § 430. When defendant may demur.
 § 431. Demurrer must specify, etc. May be taken to part. May answer and demur at same time.
 § 432. What proceedings are to be had when complaint amended.
 § 433. Objection not appearing on complaint, may be taken by answer.
 § 434. Objections, when deemed waived.

§ 430. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties for the same cause; or,
4. That there is a defect or misjoinder of parties plaintiff or defendant; or,
5. That several causes of action have been improperly united; or,
6. That the complaint does not state facts sufficient to constitute a cause of action; or,
7. That the complaint is ambiguous, unintelligible, or uncertain.

DEMURRER GENERALLY.

Office—admits facts, 8 Cal. 397; 19 Cal. 128; 24 Cal. 602; 28 Cal. 337; and should not state them, 24 Cal. 239; to whole or part, sec. 431; raises issue of law, secs. 589, 592.

Limits—not too general, 1 Cal. 448; 4 Cal. 330; 10 Cal. 237; 24 Cal. 332; 26 Cal. 294; 47 Cal. 90, 608; 49 Cal. 560: grounds, specifying, sec. 431; not to prayer, 10 Cal. 299; 28 Cal. 228; 38 Cal. 230: not for change of venue, 15 Cal. 221; and see sec. 396.

Sustained—when, 50 Cal. 276, 520, 568; *Hartman v. Olvera*, December 22d, 1879, 4 Pac. C. L. J. 452.

Service of—sec. 465.

Notice—of ruling on, time runs from service of, sec. 476.

As appearance—sec. 1014.

Hearing on—secs. 593, 594.

Judgment on—sec. 636.

GROUNDS OF DEMURRER.

SUBDIVISION 1. No jurisdiction—6 Cal. 336; 16 Cal. 432; 49 Cal. 351; 11 Cal. 751. *Existing at any stage of the proceedings, see NON-WAIVER, sec. 434a.*

SUBDIVISION 2. Disability of plaintiff—see PARTIES, sec. 367 *et seq.*; 49 Cal. 455.

SUBDIVISION 3. Another action pending—generally, 14 Cal. 42; 27 Cal. 105, 358; 29 Cal. 314; 32 Cal. 628; 36 Cal. 132; 41 Cal. 62.

SUBDIVISION 4. Joinder of parties—generally, secs. 378, 381, 382, 383, 414, 578, 579; estoppel on objection as to, 4 Cal. 197; 40 Cal. 105; waiver of objection as to, sec. 434.

Non-joinder—of plaintiffs, sec. 382; 3 Cal. 270, 465; 8 Cal. 516, but see sec. 394; 12 Cal. 126; 21 Cal. 164; 30 Cal. 96; of defendants, 8 Cal. 74; 11 Cal. 366; 17 Cal. 503; 23 Cal. 245; 30 Cal. 455; 38 Cal. 24; 44 Cal. 396; 53 Cal. 296.

Misjoinder—of plaintiffs, secs. 378, 381, 382, 434; 6 Cal. 471; 10 Cal. 302, 347; 21 Cal. 633; 26 Cal. 337; 29 Cal. 639; 40 Cal. 165; 50 Cal. 459; of defendants, 5 Cal. 313; 30 Cal. 586; Wilson v. Castro, 31 Cal. 426; 44 Cal. 319; 48 Cal. 234; 53 Cal. 665; "Debris" case, 53 Cal. 721; Hooper v. Flood, February 28th, 1880.

SUBDIVISION 5. Misjoinder of causes of action—7 Cal. 133; 10 Cal. 217; 43 Cal. 180; 47 Cal. 87; 50 Cal. 523, 652; 51 Cal. 431, 511; 52 Cal. 250; Haskell v. Haskell, March 5th, 1880; generally, see sec. 427, and notes.

SUBDIVISION 6. Insufficiency of complaint—10 Cal. 347, 559; 12 Cal. 314; 15 Cal. 414; 18 Cal. 75; 19 Cal. 85, 481; 20 Cal. 211; 22 Cal. 457; 26 Cal. 294; 29 Cal. 45; Kent v. Snyder, 30 Cal. 672; 42 Cal. 279; 47 Cal. 87; 49 Cal. 455, 560; 50 Cal. 127, 298; 52 Cal. 142, 473, 504; 53 Cal. 74, 267; Haskell v. Haskell, March 5th, 1880; Conner v. Bludworth, April 26th, 1880. *Raising at any time*, see NON-WAIVER, sec. 434n.

SUBDIVISION 7. Ambiguity—25 Cal. 82; 29 Cal. 156; 36 Cal. 195; 39 Cal. 618; 41 Cal. 595, 657; 43 Cal. 191; 45 Cal. 21, 125; 47 Cal. 488; 50 Cal. 132, 639; 53 Cal. 435.

§ 431. The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may demur and answer at the same time.

Specifying grounds—6 Cal. 386; 25 Cal. 82; 30 Cal. 666; 39 Cal. 401; 44 Cal. 43; 50 Cal. 121; 52 Cal. 356; and see DEMURRER GENERALLY. *Limits*, not too general, sec. 430n.

Whole or Part—31 Cal. 103; 47 Cal. 603, and sec. 430n as to generality.

Demurrer with answer—31 Cal. 101; 32 Cal. 208; answer after demurrer, as waiver, 1 Cal. 206, 470, 481.

§ 432. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended, to be filed, and a copy of the amendments, or amended complaint, must be served upon the defendants affected thereby. The defendant must answer the amendment or the complaint, as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases. [In effect March 9th, 1880.]

Amendment—generally, secs. 472, 473; to complaint, sec. 473n, 28 Cal. 673.

Time to answer—23 Cal. 130; 30 Cal. 192; 32 Cal. 131: ten days, *mdt.* 1880.

Default—30 Cal. 192; generally, sec. 585.

§ 433. When any of the matters enumerated in section 580 do not appear upon the face of the complaint, the objection may be taken by answer.

Objection by answer—29 Cal. 637; 45 Cal. 270; 47 Cal. 221; 49 Cal. 155.

§ 434. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Waiver—Answer, admissions by non-denial, sec. 462; 4 Cal. 117; 8 Cal. 116; 11 Cal. 116; insufficient denials, objection must be raised below, 1 Cal. 196; 35 Cal. 635; 46 Cal. 408; 50 Cal. 417; 53 Cal. 135; *Splers v. Dunham*, February 16th, 1880; *Pac. Co. v. Kirkham*, June 4th, 1880. *Causes of action, improperly uniting*, 1 Cal. 395; 10 Cal. 217; 32 Cal. 342; 51 Cal. 431. *Removable objections*, 4 Cal. 197, 244; 10 Cal. 562; 25 Cal. 88; 30 Cal. 95; 31 Cal. 48; 44 Cal. 43; 48 Cal. 155; 51 Cal. 175. *Joinder, defective or improper*, 1 Cal. 168; 4 Cal. 313; 6 Cal. 164; 7 Cal. 333; 10 Cal. 167; 21 Cal. 633; 29 Cal. 68; 30 Cal. 126; 38 Cal. 521; 48 Cal. 264; 50 Cal. 223; 51 Cal. 431; 52 Cal. 263. *Limitations, Statute of*, 23 Cal. 25.

Non-waiver—of objections to jurisdiction and complaint's validity, *mdt.* at any stage of the proceedings, 10 Cal. 560; 29 Cal. 437; 52 Cal. 68; mode of taking after answer, *Hentsch v. Porter*, 10 Cal. 560.

CHAPTER IV. THE ANSWER.

- § 437. Answer, what to contain.
 438. When counter-claim may be set up.
 439. When defendant omits to set up counter-claim.
 440. Counter-claim not barred by death or assignment.
 441. Answer may contain several grounds of defense. Defendant may answer part and demur to part of complaint.

§ 437. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant;

2. A statement of any new matter constituting a defense or counter-claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint. [In effect July 1st, 1874.]

Contents and character of answer—*After demurrer overruled*, 45 Cal. 272. *Classification of defenses*, *Piercy v. Sabin*, 10 Cal. 22, 303; 21 Cal. 50. *Election as to defenses*, 22 Cal. 671; 30 Cal. 200. *Generally*, secs. 431 to 434, 441, 452; 1 Cal. 18, 194, 362, 368. *Narrowness*, 18 Cal. 461; 27 Cal. 669. *Prohibited defenses*, 36 Cal. 378; 46 Cal. 100. *Several answers*, 33 Cal. 92; 34 Cal. 47. *Waiver by*, 1 Cal. 206, 471, 481; 50 Cal. 185.

SUBDIVISION 1. General denial—see subd. 2, and DENIALS, *infra*. Specific denial—see subd. 2, and DENIALS, *infra*. Material allegations—see subd. 2, and DENIALS, *infra*.

SUBDIVISION 2. Generally—1 Cal. 362, 371; 4 Cal. 233; 9 Cal. 74; 21 Cal. 11, 430; 30 Cal. 173, 439; 31 Cal. 225; 32 Cal. 620; 35 Cal. 274; 40 Cal. 100, 425. *New matter*—see *infra*. *Defenses*—broadly, see classification of, under CONTENTS AND CHARACTER OF ANSWER, *supra*; strictly, see NEW MATTER, under CONFESSION AND AVOIDANCE. *Counter-claim*—see NEW MATTER, *infra*. *Verification of pleadings*—see 446 *et seq.* *Specific denial*—see DENIALS, *infra*. *Information and belief*—see DENIALS, *infra*. *General denial*—see DENIALS, *infra*. *Material allegations*—see DENIALS, *infra*; conclusions of law, not to be denied, see same; denials on information and belief, see same.

DENIALS.

Admissions, as affecting—generally, 18 Cal. 434; 37 Cal. 165: by attorney, sec. 233, subd. 1, note; 5 Cal. 80.

Conclusions of law, of—improper, 9 Cal. 38; 14 Cal. 112; 17 Cal. 571; 20 Cal. 330; 21 Cal. 215; 23 Cal. 338; 33 Cal. 128; 35 Cal. 452; 51 Cal. 541.

Conjunctive—insufficient, see SPECIFIC DENIAL, when insufficient.

Damages—controversing allegation of, 12 Cal. 231; 23 Cal. 223.

General—2 Cal. 494, 510; 11 Cal. 69; 14 Cal. 508; 18 Cal. 391; 22 Cal. 229; 24 Cal. 401; *Am. Co. v. Bradford*, 27 Cal. 367; 32 Cal. 176, 578; 44 Cal. 294; 48 Cal. 26; 53 Cal. 293; defenses to be specially pleaded, see NEW MATTER, *infra*.

Information and belief, on—9 Cal. 59, 453; 13 Cal. 369; 17 Cal. 308; 23 Cal. 338; *Brown v. Scott*, 25 Cal. 194; 29 Cal. 191; *Vassault v. Austin*, 32 Cal. 696; 33 Cal. 211; 36 Cal. 230; 38 Cal. 163.

Material allegations only, of—secs. 462, 463; 8 Cal. 280; 15 Cal. 411; 16 Cal. 450; 36 Cal. 233; 48 Cal. 539; compare FACTS, ALLEGATION OF, under CODE PLEADING, sec. 421n.

Specific—definition, 9 Cal. 453; form, 27 Cal. 479; 40 Cal. 62; insufficient, when, 1 Cal. 196; 10 Cal. 372; 12 Cal. 407; 14 Cal. 92, 508; 15 Cal. 638; 16 Cal. 390; 17 Cal. 126; 18 Cal. 333; 22 Cal. 168, 231; 23 Cal. 339; 25 Cal. 189; 26 Cal. 292, 417; 28 Cal. 566; 29 Cal. 531, 564, 641; 30 Cal. 211; 31 Cal. 115, 122; 32 Cal. 109; 37 Cal. 328; 38 Cal. 287, 557; 41 Cal. 411; 43 Cal. 369; 44 Cal. 610; 51 Cal. 541; sufficient, when, 20 Cal. 503; 22 Cal. 681; 27 Cal. 367; 28 Cal. 538; 32 Cal. 453; 35 Cal. 149; 40 Cal. 62; 46 Cal. 656; 49 Cal. 71; 50 Cal. 129, 610, 615, 620.

Sufficiency of—see under SPECIFIC DENIALS, *supra*, and 9 Cal. 33, 43; 18 Cal. 433, 461; 28 Cal. 170; 29 Cal. 189; 31 Cal. 331; 34 Cal. 161; 35 Cal. 64; 36 Cal. 230; 45 Cal. 655; 50 Cal. 615; 51 Cal. 571.

NEW MATTER.

Character of—generally, 10 Cal. 22, 303; 13 Cal. 430; 52 Cal. 99, 154; does not waive denial, 52 Cal. 565; and see INCONSISTENT DEFENSES, *et seq.*

Confession and avoidance—21 Cal. 50; 51 Cal. 571; and see CHARACTER OF NEW MATTER, *supra*.

Deemed controverted—sec. 462.

Counter-claim—see sec. 438n; also, secs. 439-442.

Specially pleading—8 Cal. 590; 9 Cal. 75; 10 Cal. 560; 12 Cal. 534; 13 Cal. 640; 14 Cal. 415; 42 Cal. 174; 45 Cal. 483; 50 Cal. 57; 52 Cal. 263, 427, 435, *et seq.*

ANSWER GENERALLY.

Admissions—see DENIALS, *supra*, and sec. 462; also, sec. 447.

Amendments of—secs. 472, 473n. Appearance by—sec. 1014. Character of—see CONTENTS AND CHARACTER OF, *supra*. Construction of—sec. 452. Conditions precedent—sec. 457. Contents of—see *supra*.

Counter-claim—sec. 437, subd. 2; also, secs. 438, 439-442. Cross-complaint—sec. 442. Defenses—as including denials, see *Classification of*, under CONTENTS AND CHARACTER OF ANSWER, *supra*; more strictly, see sec. 437, subd. 2; NEW MATTER, *supra*, and sec. 462. Denials—see *supra*. Disclaimer—sec. 739n. Errors—disregarding, sec. 475.

Estoppel—sec. 1908. General rules of pleading—sec. 452 *et seq.*

Judgment on pleadings—sec. 585n. New matter—see *supra*. Parties—sec. 367 *et seq.* Service—sec. 465. Sham and irrelevant—sec. 453. Striking out—sec. 453n. Supplemental—sec. 464. Time—extension of, sec. 1054. Verification—sec. 446 *et seq.* Waiver—sec. 434.

CODE CIV. PROC.—14.

ANSWER IN PARTICULAR CASES.

Accord and satisfaction—40 Cal. 97. Account, items of—demanding, sec. 454. Attachment—justification under, 22 Cal. 651; 51 Cal. 524; 53 Cal. 261. Claim and delivery—return asked, sec. 667. Contract—conditions precedent in, see ANSWER GENERALLY; by firm, 22 Cal. 357. Ejectment—secs. 739, 741; 36 Cal. 633; 47 Cal. 21, 146, 437; 48 Cal. 537; 50 Cal. 26, 258, 310; 51 Cal. 178, 198, 545; 53 Cal. 405, 435, and see EQUITABLE DEFENSE, sec. 433*n*. Fraud—5 Cal. 161; 48 Cal. 152. Instrument—written, effect of setting forth, secs. 448, 449. Joinder—defective or improper, 45 Cal. 264; 49 Cal. 155. Judgment—sec. 456; 39 Cal. 539; 53 Cal. 135; and see JUSTIFICATION under process, *infra*. Justification—under process; execution, 7 Cal. 554; 10 Cal. 304; 19 Cal. 112, 622; attachment, see that head. Land contest—49 Cal. 356. Libel—sec. 461. License—45 Cal. 485. Limitations, statute of—pleading, see sec. 312*n*; setting up in answer, 35 Cal. 122; 47 Cal. 293; 52 Cal. 257, 262. Mortgage—45 Cal. 580. Payment—17 Cal. 571; 21 Cal. 74; 30 Cal. 174. Promissory note—21 Cal. 74; 50 Cal. 61. Replevin—50 Cal. 615; 52 Cal. 286. Slander—sec. 461. Statute—private, pleading, sec. 459. Trespass—32 Cal. 578; 49 Cal. 598. Undue influence—see MORTGAGE.

§ 438. The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract; any other cause of action arising also upon contract, and existing at the commencement of the action.

Section—construction of, 26 Cal. 305.

SUBDIVISION 1. See TRANSACTION, under COUNTER-CLAIM, *infra*.

SUBDIVISION 2. See CONTRACT, under COUNTER-CLAIM, *infra*.

COUNTER-CLAIM.

Action, subject of—connected with; see TRANSACTION, *infra*.

Contract—arising out of, 18 Cal. 171; 26 Cal. 305; 30 Cal. 252; 41 Cal. 56.

Cross-demands—deemed compensated, sec. 440.

Dismissal—none where, sec. 581, subd. 1.

Distinguishable—from cross-complaint, 34 Cal. 122; 38 Cal. 584; 41 Cal. 137.

Equitable defense—by way of; requisites, 19 Cal. 299; 30 Cal. 443; 44 Cal. 362; ejectment, 19 Cal. 671; 42 Cal. 346, 392, 452; 46 Cal. 530; 47 Cal. 146; 50 Cal. 57, 310; 52 Cal. 154; 53 Cal. 405.

Parties—between which allowable, 4 Cal. 229; 14 Cal. 233; 19 Cal. 658; 20 Cal. 281; 23 Cal. 627; 36 Cal. 301; 41 Cal. 56.

Pleading—19 Cal. 150; 49 Cal. 165; specially, 9 Cal. 75.

Separate suit—must be maintainable on, 3 Cal. 382; 8 Cal. 405; 14 Cal. 223; 19 Cal. 147, 658; 20 Cal. 281; 23 Cal. 627.

Set-off—generally, see CROSS-DEMANDS, sec. 368*n*, and 19 Cal. 154;

legal, 43 Cal. 635; equitable, 7 Cal. 548; 11 Cal. 101; and see SEPARATE SUIT.

Subject of action—connected with, see TRANSACTION.

Sufficiency of—valid, 51 Cal. 223; insufficient, 41 Cal. 661; 49 Cal. 163; 41 Cal. 639; 52 Cal. 154; 53 Cal. 31.

Test of—see SEPARATE SUIT.

Transaction—relating to, 35 Cal. 274; 39 Cal. 389; 45 Cal. 10; 49 Cal. 163; 53 Cal. 31.

Waiver—sec. 439; 35 Cal. 274.

§ 439. If the defendant omit to set up a counter-claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

Waiver of counter-claim—*Contra*, before this section, 6 Cal. 453; 23 Cal. 639; 26 Cal. 306.

§ 440. When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other. [In effect July 1st, 1874.]

Cross-demands—when deemed compensated, 47 Cal. 78.

§ 441. The defendant may set forth by answer as many defenses and counter-claims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint, and demur to the residue.

Inconsistent defenses—13 Cal. 623; *Bell v. Brown*, 22 Cal. 678; 25 Cal. 4; 30 Cal. 192; 34 Cal. 39; 43 Cal. 264; 52 Cal. 565.

§ 442. Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. [In effect July 1st, 1874.]

Cross-complaint—requisites of, 24 Cal. 141; 38 Cal. 585; 40 Cal. 110; 41 Cal. 137; 44 Cal. 381; 49 Cal. 55; sufficiency of, 51 Cal. 491; 52 Cal. 154; 53 Cal. 435; dismissal, none where, sec. 581, subd. 2; 53 Cal. 31; trustee, against, 51 Cal. 431; for injunction, 47 Cal. 549; in ejectment, 48 Cal. 386; 52 Cal. 154; 53 Cal. 435.

CHAPTER V.

DEMURRER TO ANSWER.

§ 443. When plaintiff may demur to answer.

§ 444. Grounds of demurrer.

§ 443. The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defenses or counter-claims set up in the answer. [In effect July 1st, 1874.]

Demurrer to answer—13 Cal. 623; 25 Cal. 31; and compare sec. 430n.

Waiver—as to sufficiency of answer, 34 Cal. 106; 50 Cal. 417; and compare sec. 434.

Demurrer—service of, sec. 465; extension of time for, sec. 1054; to complaint, see sec. 430n.

§ 444. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counter-claim have been improperly joined;
2. That the answer does not state facts sufficient to constitute a defense or counter-claim;
3. That the answer is ambiguous, unintelligible, or uncertain.

Grounds of demurrer—see sec. 430; subds. 5, 6, 7, and notes.

SUBDIVISION 2. General demurrer—what amounts to, 48 Cal. 36.

CHAPTER VI.

VERIFICATION OF PLEADINGS.

§ 446. Verification of pleadings.

§ 447. Copy of written instrument contained in complaint admitted, unless answer is verified.

§ 448. When defense is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff, under oath.

§ 449. Exceptions to rules prescribed by two preceding sections.

§ 446. Every pleading must be subscribed by the party or his attorney; and when the complaint is verified, or when the State, or any officer of the State, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or unless an officer of the State, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief; and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof.

Pleading subscribed—by whom, 8 Cal. 572; 30 Cal. 192; printed signature, 49 Cal. 413.

Unverified complaint—permits general denial, 6 Cal. 640.

Unverified answer—effect of, 9 Cal. 423; 13 Cal. 416; objection to, 6 Cal. 67; 10 Cal. 464; 41 Cal. 298.

Verified answer—insufficient averments of, 13 Cal. 87; 52 Cal. 171. And see SPECIFIC DENIALS, when insufficient, sec. 437a.

Information and belief—form of verification on, 9 Cal. 453; 17 Cal. 21; 19 Cal. 30; 46 Cal. 403.

Several parties—where, 19 Cal. 35; 47 Cal. 249.

Oath—administration of, 13 Cal. 643; 17 Cal. 123.

Amendment—by verifying, 6 Cal. 62; 10 Cal. 464; 20 Cal. 632.

§ 447. When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified.

Written instrument—setting forth copy, 13 Cal. 62; 14 Cal. 112; 31 Cal. 66; 32 Cal. 83; 36 Cal. 299.

Promissory notes—1 Cal. 159, 194; 4 Cal. 202; 33 Cal. 560; signature by printed fac-simile, 48 Cal. 565.

Admission of execution—31 Cal. 73; 32 Cal. 88; 33 Cal. 473.

Reference—pleading by, 24 Cal. 78; 60 Cal. 298.

§ 448. When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant. [In effect July. 1st, 1874.]

Omission of affidavit—denying execution, 49 Cal. 38.

§ 449. But the execution of the instrument mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case. [In effect April 16th, 1880.]

Inspection of writings—order for, sec. 1000.

CHAPTER VII.

GENERAL RULES OF PLEADING.

452. Pleadings to be liberally construed.
 453. Sham and irrelevant answers, etc., may be stricken out.
 454. How to state an account in pleadings.
 455. Description of real property in a pleading.
 456. Judgments, how pleaded.
 457. Conditions precedent, how to be pleaded.
 458. Statute of Limitations, how pleaded.
 459. Private statutes, how pleaded.
 460. Libel and slander, how stated in complaint. Not necessary to allege or prove special damages.
 461. Answer in such cases.
 462. Allegation not denied, when to be deemed true. When to be deemed controverted.
 463. A material allegation defined.
 464. Supplemental complaint and answer.
 465. Pleadings subsequent to complaint must be filed and served.

§ 452. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Pleadings, construction of—see 1 Cal. 167; 32 Cal. 176, 639; 40 Cal. 33; 49 Cal. 610; 50 Cal. 258.

Liberal construction—48 Cal. 221, 610; and see secs. 473, 475; but see 49 Cal. 612; 52 Cal. 99.

Strict construction—formerly, 1 Cal. 361; 3 Cal. 322; 5 Cal. 50; 9 Cal. 36; 10 Cal. 322; 14 Cal. 42, 108; 23 Cal. 112; 26 Cal. 418; 29 Cal. 16; 30 Cal. 32; 49 Cal. 612; 52 Cal. 99; but see 28 Cal. 684.

Substantial justice—1 Cal. 98; 28 Cal. 684.

§ 453. Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.

Section generally—22 Cal. 566; 34 Cal. 161; 43 Cal. 180, 369.

Striking out—generally, 13 Cal. 623; 15 Cal. 414; 25 Cal. 37; 28 Cal. 295; 29 Cal. 565; and compare sec. 433: not at chambers, 30 Cal. 560: notice of motion, specifying grounds, 33 Cal. 173.

Sham and irrelevant answers—pretended defenses, 10 Cal. 22; 13 Cal. 387; 32 Cal. 571; 36 Cal. 300; 40 Cal. 168, 444: affidavit of good faith, defeats objection, 18 Cal. 337: general denial, striking out, 51 Cal. 313; 52 Cal. 171.

Irrelevant and redundant matter—11 Cal. 104; 15 Cal. 414; 16 Cal. 51, 578; 28 Cal. 679; 30 Cal. 194, 565; 53 Cal. 255.

§ 454. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular. [In effect March 9th, 1880.]

Account—setting forth, 1 Cal. 437; 32 Cal. 634.

Bill of particulars—17 Cal. 280; 32 Cal. 638; 46 Cal. 30.

§ 455. In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer upon execution to identify it.

Description—5 Cal. 42; 6 Cal. 155; 16 Cal. 433; 19 Cal. 300; 21 Cal. 140; 30 Cal. 467.

§ 456. In pleading a judgment, or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.

Pleading judgment, or other determination—12 Cal. 181, 283; 35 Cal. 448; 53 Cal. 135.

Judgment—17 Cal. 518; 36 Cal. 117; and see Justification under Process, note on Answer in Particular Cases, sec. 437; "given or made," 52 Cal. 407.

Determination of board—47 Cal. 488.

§ 457. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance:

Conditions precedent—interpretation of, see Civil Code, sec. 1437; 5 Cal. 341; 17 Cal. 276, 588; 24 Cal. 632; 34 Cal. 670; 50 Cal. 350, 575; allegation of, 6 Cal. 258; 30 Cal. 486; 35 Cal. 448; 49 Cal. 566; general averment, in contract only, 52 Cal. 350.

Particular instances—attorney paid, 3 Cal. 110; deed, demand, tender, etc., 25 Cal. 266; 35 Cal. 661; 40 Cal. 433; 41 Cal. 420, 532; 45 Cal. 302; 46 Cal. 8; 47 Cal. 72; insurance policy, fire, 44 Cal. 264; 47 Cal. 416; statutory conditions, section does not cover, 24 Cal. 630; 35 Cal. 448; 39 Cal. 490; 52 Cal. 350; taxes, street assessments, etc., 22 Cal. 133; 47 Cal. 456; 48 Cal. 427, 561.

§ 458. In pleading the Statute of Limitations, it is not necessary to state the facts showing the defense, but it

may be stated generally that the cause of action is barred by the provisions of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

See LIMITATIONS GENERALLY, pleading, sec. 312_n: before Code, 11 Cal. 571; 27 Cal. 278: specially pleading, 47 Cal. 291: replication assumed, 49 Cal. 301.

§ 459. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage.

§ 460. In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken.

Colloquium—34 Cal. 58; 41 Cal. 378; 47 Cal. 207; 51 Cal. 75.

Imnendo—41 Cal. 378.

§ 461. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Libel suit—answer in, 9 Cal. 529; 10 Cal. 371.

Truth—41 Cal. 379; 47 Cal. 258; 50 Cal. 631; 51 Cal. 75.

Mitigating circumstances—41 Cal. 379; 47 Cal. 252.

Privileged communication—47 Cal. 624.

§ 462. Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party.

Admissions and replications—8 Cal. 275; 12 Cal. 403; 15 Cal. 638; 19 Cal. 28; 31 Cal. 231; 32 Cal. 450; 34 Cal. 160; 40 Cal. 110; 41 Cal. 133, 279; 44 Cal. 160; 48 Cal. 483; 49 Cal. 301; 52 Cal. 565.

§ 463. A material allegation in a pleading is one essential to the claim or defense, and which could not be

stricken from the pleading without leaving it insufficient.

Material allegation—defined, 9 Cal. 499; 15 Cal. 411; 48 Cal. 439: complaint, see FACTS, ALLEGATION OF, under Code Pleading, § 421a: answer, denials of, in, see sec. 437a.

§ 464. The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.

Complaint, supplemental—6 Cal. 483; 14 Cal. 675; 15 Cal. 308; 50 Cal. 195.

Answer, supplemental—27 Cal. 247; 30 Cal. 472; 41 Cal. 221; 47 Cal. 437; *Harding v. Minear*, April 6th, 1880.

Amending pleadings—see sec. 472.

§ 465. All pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party or his attorney. [In effect July 1st 1874.]

Extension of time—for filing and serving, 47 Cal. 86.

Amended complaint—must be served, 53 Cal. 293.

Service of papers—sec. 1011 *et seq.*

CHAPTER VIII.

VARIANCE—MISTAKES IN PLEADINGS
AND AMENDMENTS.

- 469. Material variances, how provided for.
- 470. Immaterial variance, how provided for.
- 471. What not to be deemed a variance.
- 472. Amendments of course, and effect of demurrer.
- 473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc.
- 474. Suing a party by a fictitious name, when allowed.
- 475. No error or defect to be regarded unless it affects substantial rights.

§ 469. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just. [In effect July 1st, 1874.]

Material variance—32 Cal. 11; 45 Cal. 193, 515.

Immaterial variance—sec. 470.

Variance, fatal—sec. 471.

§ 470. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Variance—material, sec. 469; fatal, sec. 471, and note; curable, sec. 474.

§ 471. Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

Proof—generally, secs. 1824, 1869.

Proof, failure of—dismissal for, sec. 561, subd. 5: generally, see FATAL VARIANCE, *infra*.

Variance—fatal, 3 Cal. 191; 5 Cal. 503; 10 Cal. 332; 22 Cal. 515; 33 Cal. 111; 35 Cal. 191; 41 Cal. 96; 45 Cal. 38, 517; 49 Cal. 347; 51 Cal. 605; curable, secs. 469, 470; 7 Cal. 136; 20 Cal. 590; 28 Cal. 265; 30 Cal. 364; 31 Cal. 73; 32 Cal. 14, 89; 36 Cal. 94, 163; 39 Cal. 591; 41 Cal. 657.

§ 472. Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled, and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer must be considered as denied, to the extent mentioned in section 462. [In effect July 1st, 1874.]

Pleading, amendment of—complaint, 10 Cal. 410; 14 Cal. 202; 30 Cal. 76; 34 Cal. 167: answer, see *infra*.

Complaint, amended—filing, sec. 432; 28 Cal. 246: serving, 53 Cal. 293: generally, sec. 473n.

Declining to amend—effect of, see WAIVER under AMENDMENT, sec. 473n.

Answer—Amendment of, sec. 473n. With demurrer, waiver formerly, 1 Cal. 206, 470: at same time, sec. 431. After demurrer overruled, notice, sec. 476: terms, 12 Cal. 440; 23 Cal. 127; 28 Cal. 672; 38 Cal. 539.

§ 473. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this Code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; *provided*, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When, in an action to

to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made. [In effect March 9th, 1880.]

Party, name of—see under AMENDMENT, *infra*.

Mistake in other respect—see same.

Extension of time—5 Cal. 62.

Other particulars—see under AMENDMENT *infra*, topics ANSWER, COMPLAINT, DEFAULT, JUDGMENT, etc.

Judgment, order, etc.—relief from, see under AMENDMENT *infra*, topics DEFAULT, EQUITY, JUDGMENT, etc.

Surprise, etc.—see under AMENDMENT, topic OPENING DEFAULT; also, sec. 657, subd. 3, and 28 Cal. 335.

Summons—not personally served, 6 Cal. 101; and see under AMENDMENT, topic OPENING DEFAULT.

Claim and delivery—affidavit on, sec. 510.

AMENDMENT.

Answer—5 Cal. 119; 16 Cal. 153; 17 Cal. 285; 22 Cal. 130, 358; 29 Cal. 637; 31 Cal. 318; 31 Cal. 185; 38 Cal. 72; 40 Cal. 445; 47 Cal. 174, 416, 608.

Clerical errors—19 Cal. 127; and see sec. 475 and note.

Complaint—secs. 432, 472; 3 Cal. 75; 5 Cal. 224; 6 Cal. 413; 15 Cal. 145; 17 Cal. 78; 27 Cal. 35; 28 Cal. 673; 30 Cal. 77; 32 Cal. 136, 339; 37 Cal. 282; 39 Cal. 128, 616; 48 Cal. 171; 50 Cal. 525, 549; 53 Cal. 38; Kelly v. McKibbin, Feb. 22nd, 1880, 5 Pac. C. L. J. 38.

Conditions of—see TERMS.

Costs—bill of, correcting, 3 Cal. 115; as terms of amendment, 49 Cal. 36; and see TERMS.

Default, opening—conditions, see TERMS: grounds for, 2 Cal. 248; 6 Cal. 101; 9 Cal. 130; 16 Cal. 377; 18 Cal. 455; 19 Cal. 114, 605, 632; 20 Cal. 126; 34 Cal. 235; 37 Cal. 247; 40 Cal. 97, 154; 41 Cal. 17, 314; 43 Cal. 254; 46 Cal. 63; 47 Cal. 86, 619; 49 Cal. 33; motion for, 16 Cal. 160; 43 Cal. 233; showing for, 5 Cal. 80; 6 Cal. 174; 7 Cal. 280; 9 Cal. 137; 20 Cal. 138; 21 Cal. 306; 23 Cal. 129; Bailey v. Taaffe, 29 Cal. 423; 33 Cal. 325; 34 Cal. 80; 45 Cal. 54; 51 Cal. 118; 53 Cal. 69; time for, see TERM OF COURT.

Discretion—of court below as to, see sec. 128, subd. 8; sec. 657, general note; 2 Cal. 194, 409; 3 Cal. 115; 4 Cal. 229; 9 Cal. 58; 13 Cal. 606; 16 Cal. 153; 20 Cal. 138; 22 Cal. 127; 27 Cal. 238; 29 Cal. 74; 40 Cal. 445; Page v. Williams, June 10, 1880, 5 Pac. C. L. J. 490.

Equity, control over judgment in—vacating for fraud, 13 Cal. 558;

21 Cal. 442; relief, when none at law, 3 Cal. 180; 5 Cal. 467; 6 Cal. 22; 7 Cal. 32; 14 Cal. 157; 20 Cal. 114; foreclosure, see MORTGAGE.

Execution—53 Cal. 557.

Generally—2 Cal. 194; 3 Cal. 115; 7 Cal. 135; 14 Cal. 201; 17 Cal. 285; 40 Cal. 445; 41 Cal. 17, 312; 43 Cal. 253; 45 Cal. 53; 47 Cal. 527; 48 Cal. 562; 49 Cal. 346; and see DISCRETION, JUSTICE, LIBERALITY, and TERMS, *infra*.

Immaterial—see JUSTICE.

Judgment—*Correction of*, see NUNC PRO TUNC, and 5 Cal. 492; 45 Cal. 64; 53 Cal. 88. *Amendment of pleadings after*, 31 Cal. 195; 40 Cal. 445; 47 Cal. 608; 48 Cal. 171. *Relief from*: vacating, see DEFAULT, OPENING, and 5 Cal. 80; 47 Cal. 619; 49 Cal. 266; 50 Cal. 160; 53 Cal. 197; modifying, 47 Cal. 259; 49 Cal. 233; equity, control over, see EQUITY.

Justice—substantial, in furtherance of, 5 Cal. 119; 17 Cal. 235; 22 Cal. 231; 30 Cal. 321; 38 Cal. 75; 46 Cal. 327; 47 Cal. 428.

Liberality—as to, 2 Cal. 194; 18 Cal. 349; 23 Cal. 81; 38 Cal. 163.

Limitations—statute of, amendment by pleading, see PLEADING, under LIMITATIONS GENERALLY, sec. 312n.

Mistake—relief from, see DEFAULT, OPENING, and JUDGMENT; also, *Richardson v. Mussey*, Feb. 23rd, 1880, 5 Pac. C. L. J. 70.

Mortgage—and foreclosure, 16 Cal. 461; 49 Cal. 678; 52 Cal. 656.

Nunc pro tunc—entry, 9 Cal. 351; 27 Cal. 491; and see RECORD, TERM OF COURT.

Oversights—of counsel, 38 Cal. 163.

Party, name of—see AMENDMENT under Parties generally, sec. 367n, also 1 Cal. 172, 175, 191, 410; 2 Cal. 237; 9 Cal. 56; 13 Cal. 70, 558; 15 Cal. 9; 48 Cal. 434; 49 Cal. 306; 50 Cal. 258; 51 Cal. 153; 53 Cal. 33.

Pleading—sec. 472n.

Process—2 Cal. 193; 53 Cal. 557.

Record—see JUDGMENT, and TERM OF COURT; also, 3 Cal. 255; 4 Cal. 331; 9 Cal. 173, 351; 19 Cal. 127; 20 Cal. 632; 27 Cal. 491; 45 Cal. 118.

Referee—no power to allow, when, 2 Cal. 197.

Return—of officer, 23 Cal. 81.

Term of court—After expiration of, formerly, see ADJOURNMENT, sec. 33, note on JURISDICTION and TERMS, sec. 78n; also, 2 Cal. 583; 3 Cal. 255; 4 Cal. 106, 280; 5 Cal. 407; 9 Cal. 173; 19 Cal. 127, 708; 20 Cal. 109, 632; 25 Cal. 17; 28 Cal. 335; 30 Cal. 197; 51 Cal. 118.

Terms—allowance on, generally, 49 Cal. 308; for opening default, 21 Cal. 443; 36 Cal. 288; 41 Cal. 17; 48 Cal. 562; 49 Cal. 33, 101.

Verifying—amendment by, see sec. 446n.

Waiver—by amending, 14 Cal. 25; by declining to amend, 24 Cal. 633; 38 Cal. 112; 50 Cal. 499; by resisting amendment, 10 Cal. 347; of amendment by answering, 42 Cal. 227.

§ 474. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding must be amended accordingly.

Fictitious name used—2 Cal. 562; 14 Cal. 119; 27 Cal. 99; 40 Cal. 490; 42 Cal. 227, 577; 45 Cal. 692; 50 Cal. 205, 566; *McCreery v. Everding*, Feb.

Wh. 1880, 5 Pac. C. L. J. 9; *Sherman v. McCarthy*, March 3rd, 1880, 5 Pac. C. L. J. 58.

§ 475. The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

Amendment—sec. 473*n*.

Errors not prejudicial—see sec. 657, subd. 7*n*, and 9 Cal. 269; 16 Cal. 20; 20 Cal. 586; 31 Cal. 383; 32 Cal. 11, 145; 48 Cal. 346, 354; 51 Cal. 175; 52 Cal. 171, 338; 53 Cal. 491, 557.

§ 476. When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order. [In effect July 1st, 1874.]

Computation of time—sec. 12*n*.

Time to answer—secs. 432, 472, 473.

Notice, service of—sec. 1010 *et seq*.

Overruling demurrer—Notice of, incorporating in record, 52 Cal.

TITLE VII.

**Of the Provisional Remedies in Civil
Actions.**

- CHAP. I. Arrest and Bail.
II. Claim and delivery of Personal Property.
III. Injunction.
IV. Attachment.
V. Receivers.
VI. Deposit in Court.

[172]

CHAPTER I.

ARREST AND BAIL.

478. No person to be arrested except as prescribed by this Code.
479. Cases in which defendant may be arrested.
480. Order for arrest, by whom made.
481. Affidavit to obtain order, what to contain.
482. Security by plaintiff before order of arrest.
483. Order, when made, and its form.
484. Affidavit and order to be delivered to the sheriff, and copy to defendant.
485. Arrest, how made.
486. Defendant to be discharged on bail or deposit.
487. Bail, how given.
488. Surrender of defendant.
489. Same.
490. Bail, how proceeded against.
491. Bail, how exonerated.
492. Delivery of undertaking to plaintiff, and its acceptance or rejection by him.
493. Notice of justification. New undertaking, if other bail.
494. Qualification of bail.*
495. Justification of bail.
496. Allowance of bail.
497. Deposit of money with sheriff.
498. Payment of money into court by sheriff.
499. Substituting bail for deposit.
500. Money deposited, how applied or disposed of.
501. Sheriff, when liable as bail, and his discharge from liability.
502. Proceedings on judgment against sheriff.
503. Motion to vacate order of arrest or reduce bail. Affidavits on motion.
504. When the order vacated or bail reduced.

§ 478. No person can be arrested in a civil action, except as prescribed in this Code.

Imprisonment for debt and torts—Const. Cal. art. 1, sec. 15.

Arrest—parties privileged from, Const. Cal. art. 2, sec. 2; art. 4, sec. 1; Political Code, sec. 1069.

Fraud—requisite, for arrest, 1 Cal. 438; 6 Cal. 240; sec. 479, subd. 4, note; but see Const. Cal. art. 1, sec. 15.

Ne exeat—49 Cal. 465.

§ 479. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or

property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office; or in a professional employment, or for a willful violation of duty;

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff;

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. [In effect July 1st, 1874.]

Arrest—generally, 2 Cal. 609; 3 Cal. 377; 8 Cal. 87.

SUBDIVISION 1. Contract, express or implied—see Civil Code, secs. 1620, 1621.

SUBDIVISION 2. Agent's misappropriation—1 Cal. 346; 8 Cal. 624.

SUBDIVISION 3. Claim and delivery—generally, see sec. 509 *et seq.*

SUBDIVISION 4. Fraud—1 Cal. 440; 6 Cal. 61, 240.

§ 480. An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought. [In effect March 9th, 1880.]

§ 481. The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the court. [In effect July 1, 1874.]

Order—generally, 3 Cal. 377; 6 Cal. 57, 318; 10 Cal. 411.

Affidavit—requisites of, 2 Cal. 607.

§ 482. Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least five hundred dollars, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by

reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. The undertaking must be filed with the clerk of the court. [In effect July 1st, 1874.]

* Undertaking—generally, secs. 941a, 1057; also see secs. 259, subd. 2, and 561, subd. 1.

§ 483. The order may be made at the time of the issuing of the summons, or any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at the time therein mentioned, to the clerk of the court in which the action is pending.

Order of arrest—when may be made, 6 Cal. 320.

§ 484. The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest.

§ 485. The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law.

§ 486. The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest.

§ 487. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

Bail—effect of, as waiver, 6 Cal. 59; qualifications of, secs. 494, 1057; sureties, complaint against, 45 Cal. 252.

§ 488. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested.

Surrender of defendant—5 Cal. 93; 8 Cal. 552.

§ 489. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally

charged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter.

Bail—liability of, 6 Cal. 57.

Judgment—within ten-days after, 8 Cal. 554.

§ 490. If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment.

§ 491. The bail are exonerated by the death of the defendant, or his imprisonment in a State Prison, or by his legal discharge from the obligation to render himself amenable to the process.

§ 492. Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.

§ 493. Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before a judge of the court, or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking. [In effect March 9th, 1880.]

§ 494. The qualifications of bail are as follows:

1. Each of them must be a resident and householder, or freeholder, within the state.

2 Each must be worth the amount specified in the order of the arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or county clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. [In effect July 1st, 1874.]

Qualifications—of bail, sec. 1057.

§ 495. For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination must be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Justification—sec. 259, subd. 3; 10 Cal. 189.

§ 496. If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse the allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability.

Court commissioners—power as to bail, sec. 259, subd. 3.

§ 497. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail is reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In other case, the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody.

Deposit in court—secs. 572-574, 2104.

§ 498. The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

Sheriff—penalty for non-payment, Political Code, sec. 4181.

§ 499. If money is deposited, as provided in the two last sections, bail may be given, and may justify upon

notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant.

§ 500. Where money has been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

§ 501. If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving bail at any time before judgment.

§ 502. If a judgment is recovered against the sheriff upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond for the recovery of the whole or any deficiency, as in other cases of delinquency.

§ 503. A defendant arrested may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiffs may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made. [In effect July 1st, 1874.]

Defendant's waiver—6 Cal. 57.

Motion to vacate arrest—1 Cal. 347; 3 Cal. 378.

§ 504. If, upon such application, it appears that there was not sufficient cause for the arrest, the order must be vacated; or if it appears that the bail was fixed too high, the amount must be reduced.

Discharge—no rearrest after, 2 Cal. 609.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

- § 509. Delivery of personal property, when it may be claimed.
- § 510. Affidavit and its requisites.
- § 511. Requisition to sheriff to take and deliver the property.
- § 512. Security on the part of the plaintiff and proceedings in serving the order.
- § 513. Exception to sureties and proceedings thereon, or on failure to except.
- § 514. Defendant, when entitled to redelivery.
- § 515. Justification of defendant's sureties.
- § 516. Qualification of sureties.
- § 517. Property, how taken, when concealed in building or inclosure.
- § 518. Property, how kept.
- § 519. Claim of property by third person.
- § 520. Notice and affidavit, when and where to be filed.
- § 521. Actions on undertaking.

§ 509. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

Recovery of possession—of personalty, Code remedy for, 27 Cal. Civ. 38 Cal. 583; 53 Cal. 433.

Claim and delivery—optional, 38 Cal. 583; generally, 3 Cal. 469; 11 Cal. 397; 14 Cal. 410; 22 Cal. 139; 27 Cal. 451; 28 Cal. 605; 34 Cal. 645; 36 Cal. 110; 38 Cal. 507, 583.

§ 510. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;
2. That the property is wrongfully detained by the defendant;
3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;
4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff, or so seized, that it is by statute exempt from such seizure.
5. The actual value of the property.

Justices' courts—sec. 510 *et seq.*; made applicable to, sec. 870.

SUBDIVISION 5. Value—incorrectly stated in affidavit, sec. 473.

§ 511. The plaintiff or his attorney may, thereupon by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed to be, to take the same from the defendant.

Indorsement—3 Cal. 469.

§ 512. Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in custody. He must, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, delivering the same to him personally, if he can be found, or to his agent from whose possession the property was taken, or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest post-office directed to the defendant.

Seizure of property—3 Cal. 112; 24 Cal. 147.

Undertaking—liability on, 4 Cal. 114; 7 Cal. 390; 8 Cal. 448; 21 Cal. 280; 49 Cal. 302: title not affected by, 11 Cal. 277: return adjudged, see 627, 667: dismissal discharges, sec. 581, subd. 1.

Sheriff's duties—Political Code, secs. 4185, 4188, and generally, see 4175-4193.

Value—incorrectly stated in affidavit, sec. 473.

§ 513. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant excepts to the sureties, he cannot reclaim the property as provided in the next section.

Justification of sureties—10 Cal. 189.

§ 514. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except

the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 519.

Defendant's sureties—liability of, 7 Cal. 568; also compare sec. 512*n*; and as to undertakings generally, see sec. 941; qualifications of sureties, sec. 1057.

§ 515. The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time; if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

See sec. 513*n*.

§ 516. The qualification of sureties must be such as are prescribed by this Code, in respect to bail upon an order of arrest.

Sureties—qualifications of, sec. 1057.

§ 517. If the property or any part thereof be concealed in a building or inclosure, the sheriff must publicly demand its delivery; if it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

For this and remaining sections, see SHERIFF'S DUTIES, sec. 512*n*.

§ 518. When the sheriff has taken property, as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same.

§ 519. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the posses-

sion thereof, stating the grounds of such title or right and serve the same upon the sheriff, the sheriff is *no* bound to keep the property or deliver it to the plaintiff unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties; and no claim to such property by any other person than the defendant or his agent is valid against the sheriff unless so made.

§ 520. The sheriff must file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

§ 521 of said Code is repealed. [In effect July 1st, 1874.]

CHAPTER III. INJUNCTION.

- 525. Injunction, what it is and who may grant it.
- 526. When it may be granted.
- 527. At what time it may be granted, and what is required to obtain it.
- 528. Injunction after answer.
- 529. Security upon injunction.
- 530. Order to show cause why injunction should not be granted.
- 531. Injunction to suspend business of a corporation, how and by whom granted.
- 532. Motion to vacate or modify injunction.
- 533. When to be vacated or modified.

§ 525. An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof; and when made by a judge, it may be enforced as an order of the court. [In effect, March 9th, 1880.]

Injunction generally—form of, 10 Cal. 347: definition, see WRIT, sec. 46, and ORDER, sec. 1003: scope and function of, sec. 526n: kinds of, *infra*: receiver at same time, 28 Cal. 577, sec. 564: disobedience to, 8 contempt, secs. 1209, 1210: limitations, how affected by, sec. 356: proceedings to obtain, secs. 527 to 531: vacating or modifying, secs. 532, 533.

Injunction, kinds of—provisional or preliminary, also called temporary, sec. 525 *et seq.*, sec. 526, subds. 2 and 3, including Interim Injunction, sec. 530n: permanent or final, (including limited and perpetual) *see*, 526, subd. 1.

Courts and judges—power to grant injunction, on any day, secs. 76, 224: at chambers, sec. 166; court commissioners not empowered to issue, sec. 259, subd. 1.

County judge—auxiliary power of, before amdt. 1880, 6 Cal. 88, 449; 13 Cal. 41; 23 Cal. 464; 27 Cal. 151.

§ 526. An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff.

3. When it appears during the litigation that the defend-

ant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

Injunction, scope, and function of—*Generally*, equitable discretion unlimited as to, 7 Cal. 325; later steps in action, how affected by, 33 Cal. 498; 34 Cal. 272; appellate supervision over, 4 Cal. 67; 22 Cal. 362; 29 Cal. 124; 50 Cal. 344; 53 Cal. 65; *Parrott v. Floyd*, April 17th, 1880; prompt application for, 35 Cal. 548; parties to, 12 Cal. 105; 17 Cal. 440; 53 Cal. 724; when will issue to prevent violation of law, 43 Cal. 605; 47 Cal. 348; and see TAXES, *infra*. *Where remedy at law, no injunction granted*, 2 Cal. 469, 590; 6 Cal. 41, 275; 7 Cal. 53, 70; 12 Cal. 440; 14 Cal. 144, 173, 223; 25 Cal. 120; 36 Cal. 71; 47 Cal. 183, 626; 49 Cal. 676; 53 Cal. 433. *Where useless or unnecessary*, will not issue, 10 Cal. 585; 15 Cal. 128; 18 Cal. 307; 25 Cal. 119; 35 Cal. 548; 36 Cal. 70; 37 Cal. 283; 40 Cal. 471; 46 Cal. 171; 47 Cal. 647; 48 Cal. 645; 43 Cal. 266. *One court against another*, 4 Cal. 31; 6 Cal. 82; 8 Cal. 26, 35, 71, 268, 520; 9 Cal. 77, 607; 10 Cal. 577; 11 Cal. 76; 15 Cal. 134; 51 Cal. 145, 562.

SUBDIVISION 1. Final injunction—see PREVENTIVE RELIEF, sec. 580*n*; RECEIVER, sec. 564.

SUBDIVISIONS 2 and 3. Irreparable injury—3 Cal. 241, 334; 5 Cal. 120; 7 Cal. 341; 8 Cal. 397; 10 Cal. 449; 13 Cal. 156, 190; 14 Cal. 460; 21 Cal. 448; 27 Cal. 433. **Threatened act**—8 Cal. 397; 10 Cal. 217; 13 Cal. 312; 14 Cal. 551; 25 Cal. 485; 31 Cal. 301; 53 Cal. 416, 724; and see TRESPASS, *infra*. **Waste**—generally, 34 Cal. 15; during foreclosure, sec. 745.

Taxes—enjoining collection, suits, sales, etc., 2 Cal. 593; 6 Cal. 41; 11 Cal. 361, 380; 12 Cal. 273, 298, 299; 13 Cal. 175; 18 Cal. 307; 36 Cal. 70; 46 Cal. 416; 47 Cal. 647; 48 Cal. 65; 49 Cal. 94; 51 Cal. 406.

Fraud—15 Cal. 349; 29 Cal. 59; 49 Cal. 94, 278.

Trespass—5 Cal. 108; 7 Cal. 320; 14 Cal. 544; 15 Cal. 206; 16 Cal. 206; 17 Cal. 373; 18 Cal. 209, 443, 643; 27 Cal. 645; 32 Cal. 592; 35 Cal. 476; 37 Cal. 283; 43 Cal. 389; 51 Cal. 529; 52 Cal. 322; and see WASTE, subds. 2 and 3, note, *supra*.

§ 527. The injunction may be granted at the time of issuing the summons upon the complaint, and at any time afterward, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, must show satisfactorily that sufficient grounds exist therefor. No injunction can be granted on the complaint unless it is verified. When granted on the complaint, a copy of the complaint and verification attached must be served with the injunction; when granted upon affidavit, a copy of the affidavit must be served with the injunction.

Complaint—for injunction, 22 Cal. 362; 35 Cal. 52; 53 Cal. 201, 416; verification of, sec. 446; presenting in advance of filing, 12 Cal. 107.

Affidavits—upon, 35 Cal. 52.

Preliminary injunction—discretionary powers as to, 50 Cal. 344; 52 Cal. 65.

Service—mode of, 16 Cal. 336; by sheriff, see Sheriff's Duties, Political Code, secs. 4175-4191; other notice of injunction, 1 Cal. 397.

§ 528. An injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an

order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

Injunction after answer—6 Cal. 449; 22 Cal. 362; 35 Cal. 52.

Restraining order—see INTERIM INJUNCTION, sec. 530*n*.

§ 529. On granting an injunction, the court or judge must require, except when the people of the State, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff is not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as upon bail on arrest, and upon failure to justify, if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved. [In effect April 15th, 1880.]

Undertakings—Generally, sec. 941*n*; returned on dismissal, sec. 531.

Sureties, qualifications of, sec. 1057; justification of, sec. 455, sec. 259, subd. 3.

Undertaking on injunction—order inoperative until given, 1 Cal. 106; 12 Cal. 106; liability on, 4 Cal. 384; 10 Cal. 351; 13 Cal. 585, 588; 15 Cal. 19 Cal. 625; 28 Cal. 542; 37 Cal. 34; 45 Cal. 392; *Bustamente v. Stewart*, July 2d, 1880, 5 Pac. C. L. J. 592; generally, see 2 Cal. 245; 3 Cal. 200; 6 Cal. 399; 25 Cal. 169.

§ 530. If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Interim injunction—*restraining order*, period of, 13 Cal. 585; 15 Cal. 106; bond, see 1 Cal. 397; 12 Cal. 106; also, see generally, 18 Cal. 206.

§ 531. An injunction to suspend the general and ordinary business of a corporation cannot be granted except by the court or a judge thereof; nor can it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, ex-

cept when the people of this State are a party to the proceeding.

Courts and judges—power to grant injunction, see sec. 525*n*.

§ 532. If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice to the judge, who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the injunction was granted.

Dissolution, generally—practice on, 35 Cal. 66; on appeal, when, 4 Cal. 70; reviving order on, 15 Cal. 88; formerly before county judge, 23 Cal. 464; and see sec. 525*n*: without notice, when, sec. 937; 12 Cal. 440; where continuance unnecessary, 44 Cal. 185; see, also, 8 Cal. 268; 9 Cal. 553; 12 Cal. 441; 22 Cal. 479; 29 Cal. 124.

Dissolution on complaint and answer—6 Cal. 452; 23 Cal. 82; 38 Cal. 637; 39 Cal. 166; 42 Cal. 457; 45 Cal. 186; 52 Cal. 277.

Dissolving on affidavits—15 Cal. 116; 35 Cal. 52; 39 Cal. 511; 44 Cal. 184; 49 Cal. 359; *Parrott v. Floyd*, April 17th, 1880.

§ 533. If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.

See sec. 532*n*.

CHAPTER IV.
ATTACHMENT.

- § 537. Attachment, when and in what cases may issue.
- § 538. Affidavit for attachment, what to contain.
- § 539. Undertaking on attachment.
- § 540. Writ, to whom directed and what to state.
- § 541. Shares of stock and debts due defendant, how attached and disposed of.
- § 542. How real and personal property shall be attached.
- § 543. Attorney to give written instructions to sheriff what to attach.
- § 544. Garnishment, when garnishee liable to plaintiff.
- § 545. Citation to garnishee to appear before a court or judge.
- § 546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs.
- § 547. Perishable property, how sold. Accounts without suit to be collected.
- § 548. Property attached may be sold as under execution, if the interest of the parties require.
- § 549. When property claimed by a third party, how tried.
- § 550. If plaintiff obtains judgment, how satisfied.
- § 551. When there remains a balance due, how collected.
- § 552. When suits may be commenced on the undertaking.
- § 553. If defendant recover judgment, what the sheriff is to deliver.
- § 554. Proceedings to release attachment, before whom taken.
- § 555. Attachment, in what cases it may be released and upon what terms.
- § 556. When a motion to discharge attachment may be made, and upon what grounds.
- § 557. When motion made on affidavit, it may be opposed by affidavit.
- § 558. When writ must be discharged.
- § 559. When writ to be returned.

§ 537. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless;
2. In an action upon a contract, express or implied, against a defendant not residing in this State. [In effect July 1st, 1874.]

Attachment, generally—auxiliary nature of, 6 Cal. 277; statutory strictness as to, 9 Cal. 262; 18 Cal. 155; when void, 13 Cal. 441; 18 Cal. 378; 42 Cal. 135; release by plaintiff, effect of, 32 Cal. 574; malicious issuance, complaint for, 60 Cal. 115; and see *Sharp v. Miller*, March 18th, 1860; death dissolves, 29 Cal. 359; 47 Cal. 622; 50 Cal. 365, 367; of partnership, does not dissolve it, 52 Cal. 650; dissolution generally, secs. 556-558 and notes; sheriff's duties, secs. 540n, 542, 550, and return, secs. 546, 559; levy, sec. 542n; affidavit, sec. 538n; and see sec. 557; bonds, secs. 539 and note, 540n, 549n, 555 and note; garnishment, secs. 542, 543-545; further, see *Davidson v. Dallas*, 8 Cal. 227; *Ibid.* 570; 14 Cal. 47; 21 Cal. 280; 23 Cal. 508; 35 Cal. 199; 42 Cal. 529.

Issuance, time for—9 Cal. 538; 38 Cal. 215.

Property of defendant—16 Cal. 399; 40 Cal. 391.

Preventing levy by counter-bond—see sec. 540.

SUBDIVISION 1. Contract—*Express or implied*, not applicable, 2 Cal. 17; 28 Cal. 281; 33 Cal. 165; must be indebtedness, see sec. 538, subs. 1 and 2; 52 Cal. 502; 53 Cal. 304. *For direct payment of money*, 33 Cal. 165; 50 Cal. 506; 51 Cal. 255. *Made or payable in this State*, 3 Cal. 206. *Lien as security*, 32 Cal. 55; 35 Cal. 202; 39 Cal. 549; 45 Cal. 4.

SUBDIVISION 2. Contract—*express or implied*, see note to subd. 1. **Residence**—see Political Code, sec. 52.

§ 538. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, showing:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims) and that the defendant is a non-resident of the State; and

3. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant. [In effect July 1st, 1874.]

Duty of clerk—see Political Code, sec. 1032; 24 Cal. 202; 36 Cal. 210.

Affidavit, requisites of—4 Cal. 195; 38 Cal. 215; 41 Cal. 118; also, as to section generally, see 7 Cal. 352; 8 Cal. 260; 13 Cal. 434; 18 Cal. 153; 35 Cal. 199; 41 Cal. 117: "or if originally so secured," construction, *Wilkie v. Cohn*, 54 Cal. 212.

§ 539. Before issuing the writ the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the

amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to the plaintiff's sureties, upon notice to the defendant not less than two nor more than five days, must justify before a judge or county clerk in the same manner as when bail on arrest, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment. [In effect March 30th, 1874. See decision of Supreme Court.]

Undertaking, generally—secs. 259, subd. 3; 561, subd. 1; 941n.
 Sureties—justification of, sec. 495; qualifications of, sec. 1057.
 Undertaking on attachment—form of, 7 Cal. 514; 44 Cal. 163; when made, 2 Cal. 251; damages on, 1 Cal. 410; extent of surety's liability on, 10 Cal. 354; repealed enactment of 1874, see *Goodwin v. Buckley*, March 11th, 1880.

§ 540. The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.

Writ, generally—sec. 51n.
 Sheriff, duties of—excused only by written directions, Political Code, sec. 4185; 12 Cal. 539; when released by stipulation, 53 Cal. 3; when must show process, Political Code, sec. 4188.

Exemptions from execution—sec. 600.
 Undertaking to prevent attachment—form of counter-bond, 29 Cal. 199; liability of sureties, sec. 941n; 17 Cal. 433; 29 Cal. 194; complaint on counter-bond, 52 Cal. 504; bond for release after appearance, sec. 535.

§ 541. The rights or shares which the defendant may have in the stock of any corporation or company, to

gether with the interest and profit thereon, and all debt due such defendant, and all other property in this State of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

Stocks or shares—how attached, sec. 542, subd. 4.

Debts and credits, etc.—how attached, sec. 542, subd. 5.

Garnishment generally—secs. 543-545.

§ 542. The sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in section five hundred and forty be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached and a notice that it is attached, and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein, held by or standing in the name of such other person, (naming him) are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder must index such attachment when filed, in the names both of the defendant and of the person by whom the property is held, or in whose name it stands on the records.

3. Personal property, capable of manual delivery, must be attached by taking it into custody.

4. Stocks or shares, or interest in stocks or shares, of any corporation or company must be attached by leaving with the president or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest

of the defendant is attached, in pursuance of such writ. Debts and credits, and other personal property, not liable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.

Mode of attachment—*Sheriff's duties as to, Whitney v. Butterfield, 13 Cal. 33; 19 Cal. 41; 25 Cal. 206; 29 Cal. 312. Excessive, must not be, 40 Cal. 28. Conduct validating, 14 Cal. 50. On joint property, compare 10 Cal. 33. Partnerships, as to, 8 Cal. 540; 13 Cal. 626; 22 Cal. 194; 23 Cal. 32 and compare 12 Cal. 198; 43 Cal. 119.*

PROVISION 1. Real property in defendant's name—8 Cal. 25; 19 Cal. 247; 19 Cal. 45; 43 Cal. 206, 577.

PROVISION 2. Other real property—*Leviable interest, 22 Cal. 645; 43 Cal. 313; 45 Cal. 162.*

PROVISION 3. Personal property, manually removable—*Attachment lien, officer's, Civil Code, sec. 3057; replevin, does not affect, 19 Cal. 282. Leviable interest, in pledged property, see subd. 5; in mortgaged property, Civil Code, secs. 2968-2970; in crops, 17 Cal. 541; of co-owner, 31 Cal. 609; of lessee, 32 Cal. 319. Custody under levy, 7 Cal. 32; 12 Cal. 412; 25 Cal. 556; Rogers v. Gilmore, 51 Cal. 309. Fraudulent transfer, Civil Code, secs. 1227, 3431, 3432, 3439-42.*

PROVISION 4. Stocks, shares, etc., garnishment of—5 Cal. 186; 19 Cal. 12; 9 Cal. 78; agent of corporation, service on, 38 Cal. 153.

PROVISION 5. Debts and credits, garnishment of—debt, what, 19 Cal. 363; 8 Cal. 540; 9 Cal. 24; action of debt as test, 11 Cal. 342; 34 Cal. 10; 35 Cal. 386; and compare 34 Cal. 293; too soon, 10 Cal. 339; too late, 10 Cal. 92; 15 Cal. 38; and compare 18 Cal. 438; sheriff's function, 19 Cal. 36, 49 Cal. 658; as to pledge, see *Treadwell v. Davis, 34 Cal. 607.*

§ 543. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ and a notice that such credits, or other property, or debts, as the case may be, are attached, in pursuance of such writ.

Sheriff, duties of—see sec. 540n.

§ 544. All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the

plaintiff for the amount of such credits, property, debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

Garnishment, effect of—8 Cal. 540; 9 Cal. 265; 18 Cal. 164; 21 Cal. 22 Cal. 667; also, see 2 Cal. 33; 5 Cal. 118, 294; 11 Cal. 342; 34 Cal. 601; Cal. 378, 392.

Similar provision as to execution—sec. 716.

§ 545. Any person owing debts to the defendant, having in his possession or under his control any credit or other personal property belonging to the defendant may be required to attend before the court or judge, or referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend, for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Garnishee—order for examination of, 9 Cal. 262; examination of, Cal. 409; discharge of, 3 Cal. 253; answer of, 5 Cal. 118; liability of, Cal. 16; 11 Cal. 343.

Defendant—scope of examination of, 51 Cal. 316.

Compare—proceedings supplementary to execution, secs. 714-721.

§ 546. The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

Sheriff's return—5 Cal. 53; 6 Cal. 85; 8 Cal. 21; 11 Cal. 238; 43 Cal. 5

Sheriff's duties—sec. 540n, 36 Cal. 105.

§ 547. If any of the property attached be perishable the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the

sooner subjected to execution upon another recovered previous to the issuing of the attachment and credits attached may be collected by the sheriff without suit. The sheriff's discharge for the amount paid.

ment—sec. 548n.

Whenever property has been taken by an officer by writ of attachment, and it is made to appear to the court or a judge thereof, that the parties to the action will be subserved by the court or judge may order such property in the same manner as property is sold at public auction, and the proceeds to be deposited in court to abide the judgment in the action. Such order made only upon notice to the adverse party, and in case such party has been personally served with summons in the action. [In effect March 1880.]

ment—49 Cal. 297.

Whenever personal property attached is claimed by the defendant as his property, the sheriff may summon six men to try the validity of such claim, and a hearing shall be had thereon, with the like effect as of a claim after levy upon execution.

see sec. 689; 8 Cal. 227.

ment—8 Cal. 227; 34 Cal. 629; notice to sureties on, sec. 689.

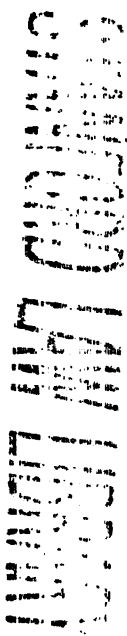
Whenever judgment be recovered by the plaintiff, the amount due to satisfy the same out of the property attached and not delivered to the defendant or his assigns hereinbefore provided, or subjected to execution after judgment, recovered previous to the attachment, if it be sufficient for that purpose, shall be paid to the plaintiff.

Whenever judgment be recovered by the plaintiff, the amount due to satisfy the same out of the property attached and not delivered to the defendant or his assigns hereinbefore provided, or subjected to execution after judgment, recovered previous to the attachment, if it be sufficient for that purpose, shall be paid to the plaintiff.

Whenever judgment be recovered by the plaintiff, the amount due to satisfy the same out of the property attached and not delivered to the defendant or his assigns hereinbefore provided, or subjected to execution after judgment, recovered previous to the attachment, if it be sufficient for that purpose, shall be paid to the plaintiff.

as to sale—sec. 540n; 8 Cal. 570; 9 Cal. 538; 14 Cal. 538.

PROC.—17.



Disposition of proceeds—liability of officer, Political Code, sec 4181; 6 Cal. 196; 10 Cal. 486; 28 Cal. 286; creditor's rights, 21 Cal. 172; and generally, see 6 Cal. 376; 30 Cal. 114.

Sales on execution—secs. 692-709.

§ 551. If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

Surplus—7 Cal. 144; and see sec. 540n.

Payment of judgment—45 Cal. 616.

§ 552. If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty, or section five hundred and fifty-five, or he may proceed as in other cases upon the return of an execution.

Counter-bond to prevent attachment—sec. 540n; 6 Cal. 277.

Bond for release after appearance—sec. 555n.

§ 553. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom.

Attachment dissolved—by judgment for defendant, 29 Cal. 316.

§ 554. Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made, releasing from the operation of the attachment any or all of the property attached; and all of the property so released, and all of the proceeds of the sales thereof, must be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff. [In effect March 9th, 1880.]

Appearance—sec. 1014.

Bond to discharge attachment—sec. 555n.

§ 555. Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders, or householders, in the State, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same be required. [In effect July 1st, 1874.]

Undertakings, generally—secs. 259, subd. 3; 495; 581, subd. 1; 941a, 1867.

Undertaking to release attachment—liability of sureties, 6 Cal. 651; 9 Cal. 501; 18 Cal. 339; 26 Cal. 535; 29 Cal. 194; effect of, *Harding v. Mear*, April 6th, 1880; counter-bond to prevent attachment, sec. 540a.

§ 556. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. [In effect March 9th, 1880.]

Dissolution—points of irregularity must be specified, 10 Cal. 337; incurable informality essential, 33 Cal. 168; not when undertaking is sufficient, *Goodwin v. Buckley*, March 11th, 1880.

§ 557. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

On affidavits—compare application to dissolve injunction, sec. 532.

§ 558. If, upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged.

§ 559. The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of

his proceedings indorsed thereon or attached thereto; and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner. [Approved March 3rd, 1876.]

Sheriff's duties—sec. 540n.

Sheriff's return—sec. 546n.

Notices of attachment filed—sec. 542, subs. 1 and 2.

CHAPTER V. RECEIVERS.

§ 564. Appointment of receiver.

§ 565. Appointment of receivers upon dissolution of corporation.

§ 566. Who shall not be appointed.

§ 567. Oath and undertaking.

§ 568. Powers of receivers.

§ 569. Investment of funds.

§ 564. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

Receiver generally—appointment of, 3 Cal. 386; custody of, 8 Cal. 546; 9 Cal. 23. Recent leading cases: French Bank Case, 53 Cal. 495; *Bateman v. The Superior Court*, etc., March 6th, 1880. Further, see 5 Cal. 494; 8 Cal. 306; 16 Cal. 146; 22 Cal. 191; 25 Cal. 11; 35 Cal. 476.

Action, when pending—sec. 1049.

Power of judge—at chambers, secs. 166, 176; of court commissioner sec. 259; of county judge, as to receivers, before Const. 1879, see M Cal. 639.

SUBDIVISION 1. Vendor, creditor, partner—as to last, see 3 Cal 383.

Party applying—53 Cal. 553.

Danger of loss or injury—see 3 Cal. 386.

SUBDIVISION 2. Foreclosure—before this statute, 6 Cal. 99.

SUBDIVISIONS 3 and 4. After judgment—26 Cal. 447.

SUBDIVISION 5. Corporation—insolvent, see French Bank Case, 5 Cal. 495; dissolved, see sec. 565.

SUBDIVISION 6. Equity usage—French Bank Case, 53 Cal. 495; Bateman v. Superior Court, March 6th, 1880.

§ 565. Upon the dissolution of any corporation, the Superior Court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members. [In effect March 9th, 1880.]

Dissolution—*Involuntary*, Civil Code, see secs. 399, 400, and this Code, sec. 802 *et seq.* *Voluntary*, sec. 1227 *et seq.*, *post.*

§ 566. No party, or attorney, or person interested in an action, can be appointed receiver therein, without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an *ex parte* application, the court, before making the order, may require from the applicant an undertaking with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully maliciously, or without sufficient cause, and the court may, in its discretion, at any time after said appointment require an additional undertaking. [In effect July 1st 1874.]

Undertakings generally—see sec. 555n.

§ 567. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the

court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

Bond of receiver—Political Code, secs. 981, 982, and secs. 947-986, generally.

§ 568. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

Duties of receiver—6 Cal. 475; 15 Cal. 207; 26 Cal. 448.

§ 569. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all the parties to the action.

CHAPTER VI.
DEPOSIT IN COURT.

572. Deposit in court.

573. Money paid to clerk must be deposited with county treasurer.

574. Manner of enforcing the order.

§ 572. When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Money—must be in party's possession, 51 Cal. 442.

§ 573. If the money is deposited in court, it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe keeping of the money deposited with him the treasurer is liable on his official bond.

Deposit with clerk—sec. 2104.

Money in treasurer's hands—liable to taxation, 30 Cal. 242.

§ 574. Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money or thing and deposit or deliver it in conformity with the direction of the court.

Punishing the disobedience—contempt, sec. 1209; 51 Cal. 442.

Sheriff's duties—as to official moneys, Political Code, sec. 4181.

TITLE VIII.

Of the Trial and Judgment in Civil Actions.

- CHAP. I. Judgment in general.
- II. Judgment upon failure to answer.
- III. Issues—the modes of trial and postponements.
- IV. Trial by jury.
- V. Trial by the Court.
- VI. Of references and trials by referees.
- VII. Provisions relating to trials in general.
- VIII. The manner of giving and entering judgment.

CHAPTER I.

JUDGMENT IN GENERAL.

- § 577. Judgment defined.
 § 578. Judgment may be for or against one of the parties.
 § 579. Judgment may be against one party and action proceed as to others.
 § 580. The relief to be awarded to the plaintiff.
 § 581. Action may be dismissed or nonsuit entered.
 § 582. All other judgments are on the merits.

§ 577. A judgment is the final determination of the rights of the parties in an action or proceeding.

Judgment—confession by, sec. 1132; default by, sec. 585; demurrer on, sec. 636; estoppel as to, sec. 1908; generally, 664n; nonsuit, of, sec. 581; pleadings, on, sec. 582; on trial by court, sec. 633; on trial by jury, sec. 664. See also, 1 Cal. 134; 9 Cal. 173; 12 Cal. 467; 14 Cal. 117; 18 Cal. 625; 21 Cal. 151; 27 Cal. 228; 31 Cal. 273; 33 Cal. 474; 34 Cal. 391; 35 Cal. 550; 36 Cal. 230; 37 Cal. 282, 457, 458; 39 Cal. 639; 46 Cal. 208.

§ 578. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Parties to judgments—adding and striking out, secs. 389, 473n; service on less than all, secs. 388, 414; joint defendants, secs. 383, 989.

Judgments for or against some—liability of part, 1 Cal. 167; 6 Cal. 176; 18 Cal. 400, 402; 39 Cal. 85, 412; waiver as to joinder, sec. 434, 8 Cal. 514; 21 Cal. 635; 42 Cal. 335; 47 Cal. 221; and as to trespass, apportioning damages, etc., see 7 Cal. 152; 8 Cal. 514; 49 Cal. 155; *McCool v. Mahoney*, April 6th, 1880; nonsuit as to some parties, sec. 531n.

§ 579. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

Parties to judgments—sec. 678n.

Defendants not served—no judgment against, 2 Cal. 89; 10 Cal. 511; *Diggins v. Reay*, April 7th, 1880. See also, SEVERAL JUDGMENT, and JOINT DEBTORS, *infra*, and compare sec. 414.

Joint debtors—proceedings against, sec. 989, and see SEVERAL JUDGMENT, *infra*.

Several judgment—when proper: *Several liability*, where, though defendants joined, sec. 383; 1 Cal. 191, 470. *Joint and several liability*, where, 9 Cal. 286; 29 Cal. 429. *Joint liability*, where, against those served only, see 18 Cal. 399, 402; 39 Cal. 95; 50 Cal. 530. *Partners*, against, see 2 Cal. 89; 18 Cal. 397; 51 Cal. 184. *Ejectment*, in, 18 Cal. 219; 28 Cal. 26.

§ 580. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

EXTENT OF RELIEF.

Default, judgment by—demand of complaint limits relief, 11 Cal. 9; 20 Cal. 91, 628; 22 Cal. 645; 27 Cal. 102; 29 Cal. 165; 34 Cal. 79; but judgment beyond, not void, 30 Cal. 531; 41 Cal. 256.

Judgment where answer—*Relief confined by complaint*, 1 Cal. 479; 2 Cal. 256; 28 Cal. 294; 50 Cal. 550; 51 Cal. 151, 537; 52 Cal. 550; but asking too much relief, harmless, 49 Cal. 627; verdict confines judgment, 2 Cal. 182; striking out prayer is waiver, 23 Cal. 232; any relief covered by complaint, 34 Cal. 78; 48 Cal. 171; 53 Cal. 287. *Relief beyond complaint*, excess of prayer, 2 Cal. 283; 10 Cal. 299; 22 Cal. 634; 27 Cal. 656; 35 Cal. 37; 37 Cal. 301; increasing damages, 27 Cal. 35; adding interest, 28 Cal. 68; different from that asked, 32 Cal. 639; 48 Cal. 171; answer as aiding complaint, *Harden v. Ware*, April 7th, 1880.

RELIEF GENERALLY.

Affirmative—in answer, see *NEW MATTER*, sec. 437*n*.

Answer—where, and where none, see notes as to *JUDGMENT*, *supra*.

Averments—for, see notes as to *JUDGMENT*, *supra*.

Compensatory—Civil Code, sec. 3274.

Complaint—within and beyond, see notes as to *JUDGMENT*, *supra*; demand of, in, see sec. 426, subd. 3.

Damages—see note to sec. 657, subd. 5.

Equitable—see *SPECIFIC, PREVENTIVE*, and special heads like *Fraud, Trust*, etc. under *RELIEF IN PARTICULAR CASES*, *infra*; also, 48 Cal. 386; 49 Cal. 451; 50 Cal. 105, 195, 276, 422, 498, 549, 553; 51 Cal. 8, 823; 52 Cal. 656.

Judgment, from—sec. 473*n*.

Legal—see principal heads under *RELIEF IN PARTICULAR CASES*, *infra*.

Maintaining actions—see *LEGAL*.

Prayer for—when significant, 24 Cal. 61; 34 Cal. 375.

Preventive—*Generally*, Civil Code, secs. 3366, 3368, 3369. *Final injunction*, Civil Code, secs. 3422, 3423; 28 Cal. 84; 39 Cal. 292; 47 Cal. 481; 53 Cal. 262.

Specific—See Civil Code: *Generally*, C. C. secs. 3366. *Possession of real property*, C. C. sec. 3375, and see sec. 3387. *Possession of personal property*, C. C. secs. 3379, 3380; and see sec. 3387. *Specific performance of obligations*, C. C. secs. 3384, 3386-95; 5 Cal. 64, 219; 7 Cal. 572; 15 Cal. 375; 23 Cal. 392; 24 Cal. 178; 27 Cal. 451; 38 Cal. 453; 41 Cal. 611; 48 Cal. 48; 49 Cal. 586; 50 Cal. 327; 52 Cal. 356; 53 Cal. 321. *Revision and reforming of contracts*, C. C. secs. 3309-3402; 7 Cal. 275; 50 Cal. 588; *Leonis v. Lazzarovich*, June 4th, 1880. *Rescission*, of contracts, C. C. secs. 39, 3406-3408; 5 Cal. 182; *Herman v. Haffenegger*, Feb. 12th, 1880; *Marston v. Simpson*, Feb. 21st, 1880. *Cancellation*, of instruments, C. C. secs. 3412-3414; 47 Cal. 597.

RELIEF IN PARTICULAR CASES.

Accounting—See **PARTNERSHIP**. Account stated—9 Cal. 360; Cal. 427. **Administrator**—33 Cal. 21; 50 Cal. 456. **Breach of promise of marriage**—Hanks v. Naglee, Dec. 26th, 1879; *Boignieres v. Boulo* Feb. 7th, 1880. **Cotenant**—see **EJECTMENT**, **REPLEVIN**, **TROVER** 42 Cal. 28; 49 Cal. 618. **Contract**—Implied: waiver of tort, 43 Cal. 41 also, see **COVENANT**. **Conversion**—see **REPLEVIN** and **TROVER**. Cal. 570; 52 Cal. 306; *Rider v. Edgar*, Feb. 6th, 1880; *Payne v. Elliot* March 18th, 1880: as to demand in, see 1 Cal. 160; 11 Cal. 303; 12 Cal. 45 22 Cal. 164; 23 Cal. 360. **Corporations**—Civil Code, secs. 357, 358; 5 Cal. 300; 37 Cal. 360, 541; 45 Cal. 680. **Covenant**—51 Cal. 227, and see **WARRANTY**. **Deed**—reforming, *Leonis v. Lazzarovich*, June 4th, 1880. **Demand**—6 Cal. 31; 7 Cal. 422; 12 Cal. 479; 15 Cal. 11; 33 Cal. 290; 36 Cal. 165; 46 Cal. 538; 48 Cal. 150; 50 Cal. 23; 51 Cal. 239; and see **CONVERSION**. **Divorce**—52 Cal. 383. **Ejectment**—3 Cal. 59; 4 Cal. 27; 9 Cal. 270; 12 Cal. 403; 14 Cal. 465, 609; 15 Cal. 185, 366; 21 Cal. 609; 22 Cal. 148, 516, 615; Cal. 192, 488; 25 Cal. 440; 28 Cal. 536; 31 Cal. 487; 32 Cal. 339; 35 Cal. 63 37 Cal. 520; 41 Cal. 53, 463; 42 Cal. 28, 331, 654; 44 Cal. 36, 386; 45 Cal. 1 236; 47 Cal. 168, 481; 48 Cal. 26; 49 Cal. 472, 655; 50 Cal. 200, 310; *Bakerfield T. H. A. v. Chester*, June 1st, 1880. **Fixtures**—51 Cal. 47. **Franchise**—2 Cal. 243; 7 Cal. 128. **Fraud**—25 Cal. 559; 39 Cal. 385; 53 Cal. 296; *Payne v. Elliott*, March 18th, 1880. **Indemnity**—28 Cal. 563. **Injury**—32 Cal. 102; 52 Cal. 142. **Judgment**—action on, 12 Cal. 19; 39 Cal. 539; modifying, 53 Cal. 653; vacating, 49 Cal. 676. **Landlord**—27 Cal. 255; 47 Cal. 1 116. **Label**—47 Cal. 175, 624. **Lien**—foreclosing, *Roussel v. Green*, Feb. 6th, 1880; *Blake v. Tibbets*, April 17th, 1880. **Malicious prosecution**—50 Cal. 116. **Money had and received**—5 Cal. 243; 9 Cal. 417; 15 Cal. 346; Cal. 170; 18 Cal. 270, 404; 22 Cal. 518; 23 Cal. 113; 49 Cal. 627; 50 Cal. 6 116. **Money paid**—50 Cal. 456. **Mortgage**—sec. 726*n*; 52 Cal. 656; *Remington v. Higgins*, April 21st, 1880. **Multiplicity of actions**—5 Cal. 81; 23 Cal. 387. **Negligence**—44 Cal. 552; 50 Cal. 478; contributory, 33 Cal. 230; Cal. 153; 37 Cal. 419; 50 Cal. 385, 484; 52 Cal. 602. **Nuisance**—publ 51 Cal. 195. **Ouster**—see **EJECTMENT**. **Partnership**—Civil Code, sec 2466-2471; 2 Cal. 420; 4 Cal. 276; 26 Cal. 77; 45 Cal. 136; 46 Cal. 43; 50 Cal. 425; 52 Cal. 540. **Party wall**—51 Cal. 123. **Promissory note**—50 Cal. 4 116. **Quantum meruit**—5 Cal. 475. **Redemption**—51 Cal. 8. **Replevin**—see **CONVERSION**, 14 Cal. 410; 22 Cal. 142; 29 Cal. 622; cotenants, between, Cal. 6; 50 Cal. 474. **Right**—statutory, 16 Cal. 531; 25 Cal. 535. **Riot**—Civil Code, secs. 4452-4457; 45 Cal. 90. **Sheriff**—actions against, **Political Code**, secs. 4179-4183. **Tort**—51 Cal. 586; 53 Cal. 654. **Trespass to land**—sec. 735; 17 Cal. 310; 31 Cal. 146, 340; 35 Cal. 129; 50 Cal. 363, 496. **Trover**—see **CONVERSION**, 10 Cal. 392; 42 Cal. 98; 50 Cal. 616; not against cotenant, 51 Cal. 570. **Trust**—49 Cal. 451; 50 Cal. 107; 51 Cal. 158; 52 Cal. 363. **Use and occupation**—2 Cal. 603; 3 Cal. 201, 373. **Warranty**—cotenant of, 5 Cal. 264.

§ 581. An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

1st. By the plaintiff himself, at any time before trial upon payment of costs; *provided*, a counter-claim has not been made or affirmative relief sought by the cross-complainant or answer of defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2nd. By either party, upon the written consent of the other;

3rd. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

4th. By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it;

5th. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury.

The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly. [Approved February 25th, 1878.]

DISMISSAL OR NONSUIT.

Nonsuit—subds. 4 and 5; effect of, 47 Cal. 545.

Dismissal—subds. 1, 2, and 3; improper, remedy for, 60 Cal. 444.

Section generally—3 Cal. 185; 4 Cal. 117; 13 Cal. 40, 637; 14 Cal. 576; 15 Cal. 387; 18 Cal. 76; 20 Cal. 92, 586; 22 Cal. 100, 463; 27 Cal. 470; 29 Cal. 147, 264; 32 Cal. 488; 39 Cal. 224; 47 Cal. 547; 53 Cal. 386.

SUBDIVISION 1. By plaintiff, before trial—22 Cal. 102; 32 Cal. 488. **Exceptions**—where counter-claim, sec. 438; 29 Cal. 264; 33 Cal. 496; or where cross-complaint, sec. 442; or its equivalent, 33 Cal. 496; but otherwise before amdt. 1878, see 53 Cal. 31.

SUBDIVISION 2. By consent—not oral, 47 Cal. 542.

SUBDIVISION 3. No appearance at trial—see subd. 4. *Trial*, bringing on, sec. 594.

SUBDIVISION 4. Abandonment at trial—13 Cal. 637; 18 Cal. 77; 22 Cal. 102.

SUBDIVISION 5. No sufficient case—*Failure of proof*, 1 Cal. 113, 125, 193, 221; 9 Cal. 104, 268; 12 Cal. 438; 13 Cal. 360; 23 Cal. 593; 25 Cal. 26; 26 Cal. 525; 31 Cal. 418; 33 Cal. 116; 39 Cal. 175, 232; 45 Cal. 272; 47 Cal. 583; 48 Cal. 201, 364, 617; 49 Cal. 155; 50 Cal. 8, 176, 250, 523; 51 Cal. 605; *Herman v. Haftenegger*, Feb. 12th, 1880. *Grounds of motion for nonsuit, specifying*, see 645n; 1 Cal. 222; 10 Cal. 268; 27 Cal. 474; 41 Cal. 485; 43 Cal. 306; 45 Cal. 518; 48 Cal. 201; 50 Cal. 444. *Waiver of nonsuit*, 1 Cal. 109; 6 Cal. 26; 8 Cal. 293; 10 Cal. 190. *Compulsory nonsuit, nature of*, 42 Cal. 649; terms on, 5 Cal. 366. *Variance*, secs. 469-471. *Pleadings, judgment on*, sec. 585n.

§ 582. In every case, other than those mentioned in the last section, judgment must be rendered on the merits.

Judgments, classes of—sec. 577n.

Judgment on pleadings—sec. 585n.

CODE CIV. PROC.—18.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

§ 585. In what cases judgment may be had upon the failure of the defendant to answer.

§ 585. Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants in the cases provided for in section four hundred and fourteen.

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary, to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury or if, to determine the amount of damages, the examination of a long account be involved, by a reference as above provided.

3. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the State, must require the plaintiff, or his agent, to be examined on oath, respecting any payments that have been made to the plaintiff, or to any

se, on account of such demand, and may ent for the amount which he is entitled to

JUDGMENT BY DEFAULT.

erally—secs. 577n, 577-582, 664a, 664-675.

pleadings—*infra*.

ent, generally—assignment of, 23 Cal. 255; 25 Cal. 539: n: despite failure to furnish particulars, 32 Cal. 634: on, 9 Cal. 456; 11 Cal. 250; further, see 1 Cal. 94; 6 Cal. Cal. 441, 555; 15 Cal. 23; 16 Cal. 381; 21 Cal. 425; 27 Cal. 530; 37 Cal. 465; 40 Cal. 439.

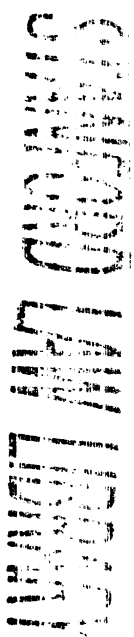
1. On money contract—*No answer filed*, 34 Cal. 25. ent's default, 18 Cal. 420; 45 Cal. 462; Maud v. Wear, Entry of default judgment, generally, 1 Cal. 131; 7 Cal. 8 Cal. 650; 30 Cal. 192; 35 Cal. 40; 53 Cal. 253; where cient, 11 Cal. 258; 14 Cal. 210; on defective summons, 42; 8 Cal. 625; 28 Cal. 153; 41 Cal. 316; and see sec. 407n, f summons: where fictitious names of defendants, 3 5; 14 Cal. 119; 23 Cal. 92; 27 Cal. 99; where no answer, overruled, or answer stricken out, sec. 636; 18 Cal. 625; ult judgment must follow complaint, sec. 580; 10 Cal. 9 Cal. 600; 21 Cal. 46; 27 Cal. 495; 30 Cal. 530; 39 Cal. 72; 394; damages, 4 Cal. 255; and see under subd. 2, note.

2. In other actions—*Entry of defendant's default, no* notes to subd. 1. *Relief*, sec. 580, and notes. *Reference, Assessment of damages*, 6 Cal. 156; 31 Cal. 239. *Proof* 9, 1869; and as to trial by court, see sec. 631 *et seq*.

3. Where summons published—see notes to subd.

JUDGMENT ON PLEADINGS.

ounds of—*Insufficiency of answer*, 4 Cal. 204; 34 Cal. 46, 9 Cal. 347, 443; 41 Cal. 128; 50 Cal. 619; 51 Cal. 526, 571; 52 *ency of complaint*, 32 Cal. 136; 50 Cal. 523; 52 Cal. 99.



CHAPTER III.

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.

§ 588. Issue defined, and the different kinds.

§ 589. Issue of law, how raised.

§ 590. Issue of fact, how raised.

§ 591. Issue of law, how tried.

§ 592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.

§ 593. Clerk must enter causes on the calendar, to remain until disposed of.

§ 594. Parties may bring issue to trial.

§ 595. Motion to postpone a trial for absence of testimony, requisites of.

§ 596. In cases of adjournment a party may have the testimony of any witness taken.

§ 588. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

See secs. 589, 590.

§ 589. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

§ 590. An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matters in the answer, except an issue of law is joined thereon.

§ 591. An issue of law must be tried by the court, unless it is referred upon consent.

Trial by court—generally, sec. 631 *et seq.*

§ 592. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order

any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code. [In effect July 1st, 1874.]

Issues of fact, trial of—generally, 6 Cal. 122; 9 Cal. 251; 21 Cal. 425; 23 Cal. 335; 50 Cal. 505.

Trial by jury—in actions at law: generally, as to jury trial, see secs. 600-628: as to fraud, 10 Cal. 412.

Waiver of jury trial—sec. 631; *Sherman v. McCarthy*, March 3rd, 1880.

Reference—secs. 638-645.

Issue of law, prior disposition of—20 Cal. 116; 32 Cal. 208.

Court, trial by—secs. 631-636: aid of jury, 19 Cal. 457: reference, *supra*.

Equity cases—distinguished from law cases, 15 Cal. 379: equitable defenses, issues before jury, etc., 13 Cal. 644; 15 Cal. 379; 16 Cal. 173; 19 Cal. 457; 30 Cal. 519; 38 Cal. 319; 42 Cal. 338; 49 Cal. 126; 50 Cal. 105: generally, 4 Cal. 6; 5 Cal. 192; 8 Cal. 501; 16 Cal. 249.

§ 593. The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain upon the calendar until finally disposed of; *provided*, that causes may be dropped from the calendar by consent of parties, and may be again restored upon notice. [In effect March 9th, 1880.]

Clerk placing on calendar—mandamus for failure, sec. 1085.

Issue—generally, sec. 588.

Dropping and restoring—amdt. of 1880.

Abolition of terms—see Const. Cal. art. 6, sec. 5.

§ 594. Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

Dismissal—sec. 581.

Judgment for want of evidence—defendant not appearing, 53 Cal. 265.

Want of prosecution, dismissal for—delay as to summons, sec. 419; 47 Cal. 614: generally, 36 Cal. 625; 45 Cal. 107; 47 Cal. 638; 50 Cal. 38: motion, who may not make, 42 Cal. 285: appeal for delay, damages on, sec. 967; 53 Cal. 187: where plaintiff not found, 39 Cal. 106: vacating judgment for surprise, etc. sec. 473*n*: new trial, sec. 657 and notes.

§ 595. A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. A trial shall be postponed when it appears to the court that the attorney of record, party, or principal witness is actually engaged in attendance upon a session of

the Legislature of this State as a member thereof. The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed. [In effect March 2nd, 1880.]

Postponement, grounds of—affidavit for, etc. see Continuance.

CONTINUANCE.

Admission—by opponent, extent of, 41 Cal. 521.

Affidavits—showing in: *Absence of witness*, see *Expected evidence*; *Materiality of evidence*, 4 Cal. 241; 43 Cal. 344; Kern Valley Bank v. Chester, June 3rd, 1880, 5 Pac. C. L. J. 520. *Due diligence*; 4 Cal. 241; Cal. 48, 89; 17 Cal. 123; 29 Cal. 563; 45 Cal. 280; 47 Cal. 162; Kern Valley Bank v. Chester, June 3rd, 1880, 5 Pac. C. L. J. 620. *Expected evidence* 14 Cal. 420; 23 Cal. 157; 31 Cal. 218; 33 Cal. 646, 697; 40 Cal. 653; 47 Cal. 9106; 48 Cal. 63; 49 Cal. 580; 53 Cal. 613; Kern Valley Bank v. Chester, June 3rd, 1880, 5 Pac. C. L. J. 520.

Bad faith—46 Cal. 114.

Costs on—sec. 1029.

Counsel—absence of, 19 Cal. 118; mistake of, 9 Cal. 212; 35 Cal. 45; sickness of, 4 Cal. 190; 41 Cal. 626.

Depositions—of absent witnesses, postponement for taking, 2 Cal. 473, 598.

Diligence, due—see AFFIDAVITS.

Discretion—decision as to continuance, is matter of, 9 Cal. 212; 1 Cal. 161; 20 Cal. 181; 23 Cal. 157; 32 Cal. 102.

Evidence—absence of, diligence, expected, materiality of, see AFFIDAVITS.

Generally, 1 Cal. 404; 2 Cal. 183, 270; 3 Cal. 185; 6 Cal. 249; 7 Cal. 411; 14 Cal. 358; 31 Cal. 95; 53 Cal. 491.

Grounds for—see AFFIDAVITS, COUNSEL, DEPOSITIONS, PARTY.

Legislature—attendance at, as ground for; inserted in section b and t. 1880.

Materiality—of evidence. See AFFIDAVITS.

Party, absence of—32 Cal. 102.

Review of decision as to—see DISCRETION: on bill of exception: only where refusal, 47 Cal. 162; on motion for new trial, 11 Cal. 21; 2 Cal. 450; and see 17 Cal. 316.

Showing for—see AFFIDAVITS.

Stipulation as to—must be in writing. See note to sec. 283, subd. 1.

§ 596. The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which

nding, or before such notary public as the
cate, which must accordingly be done, and
so taken may be read on the trial, with the
d subject to the same objections, as if the
produced.

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CHAPTER IV.

TRIAL BY JURY.

- ART. I. FORMATION OF JURY.
- II. CONDUCT OF THE TRIAL.
- III. THE VERDICT.

ARTICLE I.

FORMATION OF THE JURY.

- 600. Jury, how drawn.
- 601. Challenges. Each party entitled to four peremptory challenges.
- 602. Grounds of challenge.
- 603. Challenges, how tried.
- 604. Jury to be sworn.

§ 600. When the action is called for trial by jury, the clerk must draw from the trial jury box of the court the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted.

Jury—generally, sec. 190, and note: trial jury, secs. 193, 194.

Trial by jury—conduct of, sec. 607 *et seq.*: waiver of, sec. 631: verdict after, sec. 624 *et seq.*

Trial jury box—sec. 246.

Jury completed—45 Cal. 323.

§ 601. Either party may challenge the jurors; but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff. [In effect July 1st, 1874.]

Challenge for cause—sec. 202, and note.

Peremptory challenge, when taken—see EXAMINATION OF JURORS, extent of: criminal cases, 37 Cal. 676.

Examination of jurors—object of, 23 Cal. 376: extent of, 45 Cal. 322.

Formation of jury—irregularity in, must be substantial, 6 Cal. 405; 9 Cal. 529; 32 Cal. 40.

§ 602. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this Code to render a person competent as a juror;

2. Consanguinity or affinity within the fourth degree to any party;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party;

4. Having served as a juror or been a witness on a previous trial between the same parties, for the same cause of action;

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;

6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or of some of them;

7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party. [In effect July 1st, 1874.]

Challenge for cause, sufficiency of—*Specifying grounds*, 12 Cal. 483; criminal cases, 37 Cal. 277; 41 Cal. 37. *Objection, when to be made*, 1 Cal. 28; 18 Cal. 109.

GROUND OF CHALLENGE FOR CAUSE.

SUBDIVISION 1. Incompetency—secs. 198, 199, and notes; also, see note to subd. 4, *infra*, and 47 Cal. 388.

SUBDIVISION 2. Consanguinity or affinity—generally, see note to sec. 170, subd. 2.

SUBDIVISION 3. Close relations to either party—see notes to subds. 1 and 5.

SUBDIVISION 4. Previous trial, serving or testifying at—14 Cal. 168, and see 18 Cal. 109.

SUBDIVISION 5. Interest of juror—as to interest generally, see 37 Cal. 190.

SUBDIVISION 6. Unqualified opinion, possession of—excusing for, discretionary, 18 Cal. 109, and see 47 Cal. 388; formation or expression of, former requirement, 11 Cal. 69; degree of conviction necessary, (implied bias in criminal cases) 16 Cal. 129; 17 Cal. 142; 22 Cal. 349; 27 Cal. 507; 40 Cal. 268; 45 Cal. 137; 46 Cal. 78; 48 Cal. 253; 49 Cal. 174.

SUBDIVISION 7. Bias—review of decision as to, 49 Cal. 560; 50 Cal. 222; existence of, 5 Cal. 347; 38 Cal. 51.

§ 603. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

Jurors, examination of—see sec. 601*n*.

Discretion of court—decision not prejudicial, 41 Cal. 429; generally, 47 Cal. 388; 49 Cal. 679; 50 Cal. 222; and see notes to sec. 602, subds. 6 and 7.

§ 604. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between —, the plaintiff, and —, defendant, and a true verdict render, according to the evidence.

Oath, administration of—see secs. 2093-2097.

ARTICLE II.

CONDUCT OF THE TRIAL.

- § 607. Order of proceedings on trial.
- § 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein.
- § 609. Special instructions.
- § 610. View by jury of the premises.
- § 611. Admonition when jury permitted to separate.
- § 612. Jury may take with them certain papers.
- § 613. Deliberation of jury, how conducted.
- § 614. May come into court for further instructions.
- § 615. Proceedings in case a juror becomes sick.
- § 616. When prevented from giving verdict, the cause may be again tried.
- § 617. While jury are absent, court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.
- § 618. Verdict, how declared. Form of. Polling the jury.
- § 619. Proceedings when verdict is informal.

§ 607. When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part;
2. The defendant may then open his defense, and offer his evidence in support thereof;
3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
4. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the plaintiff must commence and may conclude the argument;
5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;
6. The court may then charge the jury.

Order of proof, discretion of court, as to—generally, sec. 2042; 37 Cal. 438; 51 Cal. 468; party, control of, over, 8 Cal. 50; 15 Cal. 334; 44 Cal. 200; relevancy of evidence, secs. 1868-1870.

SUBDIVISION 1. Plaintiff's evidence—proof required, see secs. 1867, 1869.

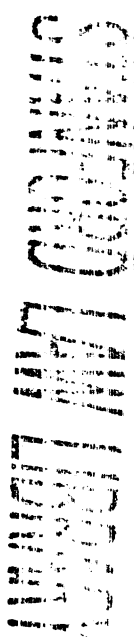
SUBDIVISION 2. Defendant's evidence—see note to subd. 1.

- . Rebutting evidence—*Burden of proof*, generally, of right to rebut, see 15 Cal. 199; 48 Cal. 614. *Credibility*; 40 Cal. 578. *Discretion of court*, as to recalling witness; 2 Cal. 298. *Re-opening case*—Where amendment; Cal. 608; where cross-complaint, 49 Cal. 233; recalling witness; 45 Cal. 80; supplementary proof, 6 Cal. 170; 26 Cal. 439; 47 Cal. 194, 590; 48 Cal. 614.
- . Arguments—plaintiff opening and closing, 2 Cal. 44 Cal. 65.
- . Several defendants—separate trials, 40 Cal. 299.
- . Charging the jury—secs. 608, 609.

CONDUCT OF TRIAL.

Amending, sec. 1048; register of, sec. 1052. Amendments and notes. Appeals—sec. 936 *et seq.* Arguments—Case, calling up—sec. 594. Chambers—powers at, notes. Charge to jury—secs. 603, 609, and notes. Contempt of, sec. 997; contempts, secs. 1209-1222. Continuance. Costs—sec. 1021 *et seq.* Court—trial by, secs. 631-657, subd. 5*n*; deliberation of jury, secs. 613, 614, 635; and see WANT OF PROSECUTION. Divorce—see sec. 125. Errors—of law, sec. 657, subd. 7, note: discussion—Evidence—secs. 1823, 2104. Exceptions—secs. 646-648. Extensions of time—sec. 1054. Facts, jury determined note, sec. 2101. Findings—sec. 633 and note. Inquiry—generally, sec. 608*n*; special, sec. 609*n*. Judges—powers of, secs. 170-172; sec. 397, subd. 4. Judgment—generally giving and entering, secs. 664-675; kinds of, sec. 577*n*; 585*n*. Jury trial—secs. 600-628. Justices' court—trials. Language of proceedings—sec. 185. Law, judge—secs. 608, 2102. Motions—sec. 1003 *et seq.* New trials—see sec. 581. Notices—sec. 1010 *et seq.* Polling jury of proof—607*n*, *supra*. Orders—1003-1009. Papers—entitled, secs. 1045, 1046; filing and service of, secs. 1047-1049. Trial—see VENUE. Pleadings—generally, secs. 420-425. 452-465; under Code, sec. 421*n*; judgment on, sec. 426. Private trial—sec. 125. Relief—sec. 580 and notes. Separation—of counsel, sec. 611. Special proceedings—secs. 1063-1822. Stipulations—secs. 1132-1179. Stipulations—sec. 283, subd. 1. Taking down—clerk, sec. 1051; short-hand reporters, see fourths—of jury, agreement of, sec. 618*n*. Trial—see sec. 588-663. Variance—secs. 469-471. Venue—secs. 392-397 *et seq.* Verdict—secs. 624-628. View—by jury, of jury trial, sec. 631. Witnesses—see EVIDENCE. Want of prosecution, sec. 594*n*.

Charging the jury, the court may state to the jury the law which it thinks necessary for their consideration in giving their verdict; and if it states the facts of the case, it must inform the jury that the exclusive judges of all questions of fact are the jury, and that they furnish to either party, at the time, upon



request, a statement, in writing, of the points of law contained in the charge, or sign at the time a statement of such points prepared and submitted by the counsel of either party.

Matters of law—court stating in charge, Const. Cal. art. 6, sec. 1, sec. 2102, also sec. 2061, and see under CHARGE TO JURY, *infra*.

Stating testimony—20 Cal. 432; 43 Cal. 85: constitutional provisions see last note.

Questions of fact—jury exclusive judges of, Const. Cal. art. 6, sec. 19; sec. 2101, also sec. 2061; 17 Cal. 166, and see under CHARGE TO JURY, *infra*. Law also, for jury, in libel, see Const. Cal. art. 1, sec. 1.

Charge to jury—Scope of, see INSTRUCTIONS, generally, *infra*, an Special instructions, sec. 609n. Construction of, 1 Cal. 476; 22 Cal. 43 48 Cal. 85; 49 Cal. 560. Law matters, on, see note, *supra*, and 7 Cal. 424 41 Cal. 123; 49 Cal. 56; 52 Cal. 315. Fact, on questions of, see note, *supra* and 22 Cal. 492; 23 Cal. 193; 24 Cal. 502; 51 Cal. 603; People v. Wong A. Ngow, Feb. 10th, 1880, 4 Pac. C. L. J. 552; McFadden v. Mitchell, April 22nd, 1880, 5 Pac. C. L. J. 334; point treated as proven, 13 Cal. 427; 1 Cal. 376; 20 Cal. 56; 33 Cal. 299; 34 Cal. 663; 41 Cal. 123; 51 Cal. 603; 5 Cal. 315; 53 Cal. 625, and see ASSUMING FACT, under INSTRUCTIONS generally, *infra*.

INSTRUCTIONS GENERALLY.

Asking—see special instructions, sec. 609n. Assuming fact—23 Cal. 193; 24 Cal. 502; 25 Cal. 197; 30 Cal. 539; 33 Cal. 299; 50 Cal. 236; 53 Cal. 612, 720. Charge in—see CHARGE TO JURY, note *supra*. Conflicting—see CONTRADICTORY. Contradictory—or inconsistent, 30 Cal. 312; 39 Cal. 573; 43 Cal. 552; 44 Cal. 65, 246; 52 Cal. 465; 53 Cal. 56, 708. Correct—see PROPER. Equity—special issues, 7 Cal. 424. Erroneous—1 Cal. 353; 6 Cal. 433; 8 Cal. 341; 9 Cal. 565; 19 Cal. 143; 24 Cal. 839; 39 Cal. 25, 123; 52 Cal. 246, 315; 53 Cal. 354, 360, 604, 612, 720; Black v. Sprague, March 6th, 1880, 5 Pac. C. L. J. 92; McFadden v. Mitchell, April 22nd, 1880, 5 Pac. C. L. J. 334; Sargent v. Linden G. M. Co. May 25th, 1880, 5 Pac. C. L. J. 404; People v. Miles, May 26th, 1880, 5 Pac. C. L. J. 420; and see REQUISITES OF; also SPECIAL INSTRUCTIONS, REFUSAL OF, sec. 609n. Effect of, see ERRORS OF LAW, sec. 657; subd. 7 and notes. Extent of—23 Cal. 331; 38 Cal. 362. Fact, on questions of—see note, *supra*; fraud, 6 Cal. 119; 8 Cal. 87, 207; 19 Cal. 143; McFadden v. Mitchell, April 22nd, 1880, 5 Pac. C. L. J. 334; Parks v. Barney, June 11th, 1880, 5 Pac. C. L. J. 499. General, too—1 Cal. 366. Granting—see under SPECIAL INSTRUCTIONS, sec. 609n. Inconsistent—see CONTRADICTORY. Irreconcilable—see CONTRADICTORY. Law, on matters of—see note, *supra*. Libel—Const. Cal. art. 1, sec. 9; 46 Cal. 124. Malicious prosecution—29 Cal. 644; 52 Cal. 246; 53 Cal. 189. Objections to—see EXCEPTIONS, under Special Instructions, sec. 609n. Oral—53 Cal. 574. Passing on—see under Special Instructions, sec. 609n. Pertinency of evidence—submitting, 49 Cal. 56. Point-treated as proven in, see ASSUMING FACT, and CHARGE, note, *supra*. Presumed—correct, 53 Cal. 420; proper, 17 Cal. 123; 20 Cal. 56; 31 Cal. 115; 38 Cal. 362; 49 Cal. 560; 53 Cal. 491; Williams v. Hartford F. Ins. Co. March 29th, 1880, 5 Pac. C. L. J. 227. Refusal of—see under SPECIAL INSTRUCTIONS, sec. 609n. Relevant—2 Cal. 39, 217; 9 Cal. 353; 24 Cal. 17; 28 Cal. 380; 36 Cal. 404; 39 Cal. 123, 691; 45 Cal. 496; 47 Cal. 93; 50 Cal. 469. Requisites of—see ASSUMING FACT, CONTRADICTORY, GENERAL, RELEVANT, VAGUE. Special—sec. 609n. Supplementary—43 Cal. 274. Testimony on—where uncontradicted, 45 Cal. 544; stating,

see note, *supra*. Useless—53 Cal. 420. Usual—sec. 2061; see also, sec. 2182. Vague—39 Cal. 690; and see TOO GENERAL.

§ 609. Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

Instructions, disposition of—asking, granting, refusing, modifying, manner of passing on, see those heads under Special Instructions, *infra*.

SPECIAL INSTRUCTIONS.

Adding to—47 Cal. 93. Asking—6 Cal. 197; 16 Cal. 78; 43 Cal. 237, 277; 53 Cal. 613; *Williams v. Hartford Fire Ins. Co.* March 29th, 1880, 5 Pac. C. L. J. 227. Disregarding—6 Cal. 197. Exceptions to—sec. 646 and notes. Granting—8 Cal. 390; 13 Cal. 172; 17 Cal. 143; 41 Cal. 66. Modifying—see ADDING TO, GRANTING, PASSING ON, OFFERING; see ASKING. Passing on—manner of, 2 Cal. 173; 5 Cal. 490; 19 Cal. 476; 25 Cal. 460; 32 Cal. 280; 34 Cal. 101; 37 Cal. 154; 40 Cal. 543; 49 Cal. 86; see also ADDING TO, GRANTING, MODIFYING, REFUSAL. Presenting—see ASKING. Proposed—6 Cal. 197; 29 Cal. 556. Reading—time of, 29 Cal. 556. Refusal of—proper, 5 Cal. 478; 6 Cal. 197; 9 Cal. 25, 390; 9 Cal. 353; 13 Cal. 599; 29 Cal. 556; 32 Cal. 231; 36 Cal. 404; 43 Cal. 496; 47 Cal. 93; 49 Cal. 166; 53 Cal. 354, 630; *People v. Smallmans*, May 15th, 1880: improper, 2 Cal. 385; 52 Cal. 611; reasons for, 8 Cal. 390; wrong, 8 Cal. 87; 30 Cal. 631; 50 Cal. 469; *People v. Ah Chung*, March 2nd, 1880, 5 Pac. C. L. J. 218; *Siemers v. Elsen*, March 24th, 1880, 5 Pac. C. L. J. 248. Time, presenting in—where many, 6 Cal. 197.

§ 610. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

View of premises—19 Cal. 427; 49 Cal. 607; 50 Cal. 556; 53 Cal. 60.

§ 611. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Temporary recess—question as to application, 23 Cal. 631.

§ 612. Upon retiring for deliberation, the jury may take with them all papers which have been received as evi-

dence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony and other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person.

Inspection of documents—by, 36 Cal. 168.

§ 613. When the case is finally submitted to the jury they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or three-fourths of them are agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. [In effect March 10th, 1880.]

Retiring for deliberation—Temporary separation, 5 Cal. 275; 19 Cal. 427; 20 Cal. 433; 21 Cal. 337; 22 Cal. 348. *Influence of judge*, 29 Cal. 258.

Three-fourths—agreement of, amdt. 1880; see Const. Cal. art. 1, sec. 1.

§ 614. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.

Information given—extent of, 45 Cal. 338; on non-judicial days, see 134, subd. 1.

Absence of attorneys—criminal cases, 5 Cal. 148; 37 Cal. 274.

§ 615. If, after the impanneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterward impaneled.

§ 616. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the

mitted to them, the action may be again tried
 y, or at a future time, as the court may direct.
 rged—formalties, 48 Cal. 324: on non-judicial days, 49

While the jury are absent the court may adjourn
 o time, in respect to other business; but it is
 s open for every purpose connected with the
 itted to the jury until a verdict is rendered or
 scharged. The court may direct the jury to
 sealed verdict, at the opening of the court, in
 agreement during a recess or adjournment for
 [n effect March 10th, 1880.]

dict—bringing in, 12 Cal. 483.
 nt for term—effect of, before amdt. 1880, 48 Cal. 324; 50
 tion of terms, by Const. 1879, see sec. 73n.

When the jury, or three-fourths of them, have
 n a verdict, they must be conducted into court,
 called by the clerk, and the verdict rendered
 eman; the verdict must be in writing, signed
 eman, and must be read by the clerk to the
 he inquiry made whether it is their verdict.
 y may require the jury to be polled, which is
 e court or clerk asking each juror if it is his
 upon such inquiry or polling, more than one-
 he jurors disagree thereto, the jury must be
 ain, but if no such disagreement be expressed,
 is complete and the jury discharged from the
 effect March 10th, 1880.]

hs—agreement of, see sec. 613n.
 eived—on non-judicial day, sec. 134.
 y—20 Cal. 69.
 —more than one-fourth, amdt. 1880; grounds for, 48 Cal.

When the verdict is announced, if it is informal
 nt in not covering the issue submitted, it may
 d by the jury under the advice of the court, or
 ay be again sent out.
 y jury—2 Cal. 183, 269.
 er of—2 Cal. 183; 3 Cal. 137; 34 Cal. 663.
 Cal. 260.

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ARTICLE III.

THE VERDICT.

- § 624. General and special verdicts defined.
 § 625. When a general or special verdict may be rendered.
 § 626. Verdict in actions for recovery of money or on establishment of counter-claim.
 § 627. Verdict in actions for the recovery of specific personal property.
 § 628. Entry of verdict.

§ 624. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusion of fact as established by the evidence, and not the evidence to prove them: and those conclusions of fact must be so presented, as that nothing shall remain to the court but to draw from them conclusions of law.

Verdict, scope of—confined by pleadings and issues, 2 Cal. 183, 251; Cal. 433; 38 Cal. 507; 41 Cal. 123: sufficient form, 25 Cal. 479; 40 Cal. 657 and as to amending, see sec. 473; 3 Cal. 137: ejectment in, secs. 740, 741 intendments as to, see generally, INTENDMENTS, sec. 53n: new trials for misconduct affecting, sec. 657, subd. 2 and note: joint defendants against, 6 Cal. 197; 15 Cal. 27; 25 Cal. 123: waiver of informality in, 38 Cal. 507; 40 Cal. 408.

General verdict—14 Cal. 168; 15 Cal. 162; 25 Cal. 479; and see SCOPE OF VERDICT, *supra*.

Special verdict—sec. 625n.

§ 625. In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

General verdict—sec. 624n.

Special verdict—*Character of*, 16 Cal. 113; 17 Cal. 299, 510; 19 Cal. 101; 31 Cal. 98. *Directed by court*, 3 Cal. 396. *Special issues*, 4 Cal. 6; 8 Cal. 501; 23 Cal. 482; 27 Cal. 360. *Change of verdict*, from special to general, 25 Cal. 539; 48 Cal. 588. *Special finding*, effect on general verdict, 20 Cal. 389; 23 Cal. 489; 31 Cal. 115: and as to equity, see 49 Cal. 126; 52 Cal. 430: insufficient, when, 50 Cal. 61.

When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant's counter-claim for the recovery of money is established, the amount of the plaintiff's claim as found by the jury must also find the amount of the

recovery—*Watson v. Damon*, March 5th, 1880, 5 Pac. C.

In an action for the recovery of specific property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return of the property, if their verdict be in favor of the plaintiff, the jury, if being in favor of the defendant, they also find the amount of the property, and if so instructed, the value of the property, and may, at the same time, assess damages, if any are claimed in the complaint or answer, and the prevailing party has sustained by reason of the loss or detention of such property. [In effect § 74.]

People v. ...—7 Cal. 568; 8 Cal. 446; 21 Cal. 274; 24 Cal. 147.

Upon receiving a verdict, an entry must be made in the minutes of the court, specifying the names of the jurors and witnesses, and the verdict at length, and where a special verdict is rendered, either the judgment rendered thereon, or if reserved for argument or further consideration, thus reserving it.

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CHAPTER V.

TRIAL BY THE COURT.

- § 631. When and how trial by jury may be waived.
 § 632. Upon trial by court, decision to be in writing and filed within twenty days.
 § 633. Facts found and conclusions of law must be separately stated. Judgment on.
 § 634. Findings may be waived, how.
 § 635. Findings, how prepared.
 § 636. Proceedings after determination of issue of law.

§ 631. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following :

1. By failing to appear at the trial;
2. By written consent, in person or by attorney, filed with the clerk;
3. By oral consent, in open court, entered in the minutes. [In effect July 1st, 1874.]

Waiver of jury trial—see Const. Cal. art. 1, sec. 7; 5 Cal. 112; 27 Cal. 249; *Sherman v. McCarthy*, March 3rd, 1880, 5 Pac. C. L. J. 58: reference as, 2 Cal. 92, 245, 261; 19 Cal. 140: equity cases, 5 Cal. 192, 294; 16 Cal. 249; 30 Cal. 512: court disregarding, secs. 309, 592; 27 Cal. 249.

SUBDIVISION 1. Failure to appear at trial—4 Cal. 112; 10 Cal. 178; 15 Cal. 23; 16 Cal. 432; 18 Cal. 409.

SUBDIVISIONS 2, 3. Consent—see REFERENCE BY CONSENT, sec. 638*n*, and WAIVER OF JURY TRIAL, reference as, *supra*.

§ 632. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. [In effect July 1st, 1874.]

Trial by court—equivalent of charge, 20 Cal. 151: case submitted, argument after, 45 Cal. 178.

Written decision filed—mandatory, 2 Cal. 305: but not as to time of filing, 4 Cal. 214; 44 Cal. 228: equity, *in*, 18 Cal. 447: effect of, 31 Cal. 95; 49 Cal. 623: waiver, 45 Cal. 178. *Thirty days*, directory merely, 44 Cal. 228; 49 Cal. 157.

§ 633. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

Section generally—mandatory, 2 Cal. 305; 3 Cal. 111; and see WRITTEN DECISION, filed, sec. 632*n*: facts found, 2 Cal. 305: separately

25; 39 Cal. 262; *Butler v. Beach*, May 26th, 1880, 5 Pac. C.

FINDINGS.

43 Cal. 323; 51 Cal. 262, 626; 52 Cal. 661; *Reynolds v. Arch* 4th, 1880, 5 Pac. C. L. J. 115; *Haffenegger v. Bruce*, 10, 5 Pac. C. L. J. 216; *Mahoney v. Braverman*, June 22d, L. J. 607; and see *Freeman v. Campbell*, under INSUFFICIENT. Amending—after appeal, 53 Cal. 88; after remittitur, argument in—see OPINION IN. Conflict in—see CONSTRUCTION OF—21 Cal. 374; 25 Cal. 587; 30 Cal. 458; Cal. 666; 39 Cal. 262; 43 Cal. 105; 48 Cal. 152; 50 Cal. 57, 112, and see REQUISITES. Contents—see REQUISITES, 49 CONSTRUCTION OF—52 Cal. 217, 495; *Manly v. Howlet*, June 22d, L. J. 607; *Arpin*, July 3d, 1880, 5 Pac. C. L. J. 626. CORRESPONDENCE. Covering all material issues—see IS- SUE. Defective—see DEFICIENT. Deficient—28 Cal. 238; Cal. 251; 53 Cal. 84, 300. Drafting—and signing, 35 Cal. 251; and see INSUFFICIENT, REQUISITES. Evidence in—16 Cal. 211. Evidence—sustaining, 34 Cal. 506; 44 Cal. 3; 51 Cal. 491; 53 Cal. 29, 649; *Mahoney v. Braverman*, June 22d, L. J. 607. Exception to—24 Cal. 228, 237; 25 Cal. 225; 28 Cal. 425; 31 Cal. 591; 34 Cal. 125, 251, 648; 35 Cal. 188; 36 Cal. 386; 42 Cal. 646; 46 Cal. 346; 49 Cal. 552; *Tompkins v. Smith*, 1880, 5 Pac. C. L. J. 468; but see IMPLIED, NONE. Matter in, see OPINIONS IN. Full—see ISSUES, COVER- ING. Impeaching—see EXCEPTIONS TO. Judgment—must support judgment, 50 Cal. 93; 51 Cal. 262, 478; other- wise, 31 Cal. 211; 33 Cal. 236; 39 Cal. 112; 41 Cal. 97; 45 Cal. 47, 48, 49, 437; 48 Cal. 28; 49 Cal. 269; and see PRESUMPTIONS. Insufficient—33 Cal. 468; 39 Cal. 262; 40 Cal. 264; Cal. 277; 53 Cal. 37; *Knight v. Roche*, March 13th, 1880, 5 Pac. C. L. J. 155; *Freeman v. Campbell*, from the Bench, May 20th, 1880, L. J. 533; and see DEFICIENT ISSUES, JUDGMENT. Is- sue—2 Cal. 591; 50 Cal. 57, 606; 51 Cal. 543; *Payne v. Elliott*, 5 Pac. C. L. J. 155; *Green v. Chandler*, April 22nd, 1880, L. J. 537; covering 51 Cal. 415, 505, 528, 628; 52 Cal. 87, 91, 252, 417, 538, 300, 686, 709; *Paulson v. Nunan*, Feb. 5th, 1880, 4 Pac. C. L. J. 155; *Kirkham*, June 4th, 1880. Judgment, must support judgment, 475; 8 Cal. 445; 44 Cal. 161; 50 Cal. 61, 90; 51 Cal. 262, 277, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000. Judgment, must support judgment, 475; 8 Cal. 445; 44 Cal. 161; 50 Cal. 61, 90; 51 Cal. 262, 277, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000. Judgment, must support judgment, 475; 8 Cal. 445; 44 Cal. 161; 50 Cal. 61, 90; 51 Cal. 262, 277, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000. Judgment, must support judgment, 475; 8 Cal.

the Bench, May 17th, 1880, 5 Pac. C. L. J. 539; see DEFICIENT, INSUFFICIENT. Supporting—judgment, see JUDGMENT. Test—of sufficiency, special verdict as, 19 Cal. 101. Ultimate facts—stating, 41 Cal. 512; 47 Cal. 174; 49 Cal. 552; 50 Cal. 112; 52 Cal. 171, 217. Unnecessary as to what, 8 Cal. 445; 34 Cal. 252: when, 31 Cal. 240. Waiver—of, see § 634.

§ 634. Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial;
2. By consent in writing, filed with the clerk;
3. By oral consent in open court, entered in the minutes.

Finding waived—non-waiver must appear, 51 Cal. 262, 626; 53 Cal. 399. Carr v. Cronan, etc. April 7th, 1880, 5 Pac. C. L. J. 264: waiver, when not judicious, 39 Cal. 381.

§ 635. Repealed. [In effect April 3rd, 1876.]

§ 636. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section five hundred and eighty-five, upon the failure of the defendant to answer. A judgment be for the defendant upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.

Issue of law—sec. 589: judgment on, demurrer overruled or sustained, 23 Cal. 106; 44 Cal. 620; 49 Cal. 346; and see secs. 472, 585: when a bar, Cal. 32: and see sec. 1908: generally, sec. 577*n et seq.*; sec. 664*n*.

Reference—sec. 638 *et seq.*

CHAPTER VI.

REFERENCES AND TRIALS BY REFEREES.

be ordered upon agreement of parties, in what cases.
 be ordered on motion, in what cases.
 of referees, qualifications, etc.
 party may object. Grounds of objection.
 ns, how disposed of.
 to report within ten days. Effect of. How excepted
 c.
 referees' finding.
 epted to, etc.

reference may be ordered upon the agree-
 parties filed with the clerk or entered in the

any or all of the issues in an action or proceed-
 of fact or of law, and to report a finding and
 ereon;

ertain a fact necessary to enable the court to
 n action or proceeding.

general—court commissioners, before, sec. 259, subd. 2:
 28: private trial, sec. 125: compulsory, see next section:
 d. 2, *infra*: general, see subd. 1, *infra*: constitutional
 of jury trial, sec. 631n. Referees—number, etc. sec. 640:
 ecs. 641, 642: trial by, sec. 638n: report of, secs. 643-45.

erence by—consent essential, 2 Cal. 92, 261; 24 Cal. 424;
 roper, 1 Cal. 336: constitutionality, sec. 631n; 2 Cal. 92:
 , 1 Cal. 45; 4 Cal. 1: order for, 2 Cal. 355; 4 Cal. 1; 9 Cal. 353.

w 1. To report a judgment, etc.—9 Cal. 213; 20 Cal. 92.

ree—sec. 1053; 2 Cal. 195; 3 Cal. 406; 5 Cal. 430; 7 Cal. 50;
 al. 92; and see CONDUCT OF TRIAL, sec. 607n.

ec. 633n.

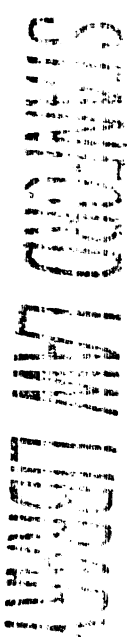
generally, secs. 577n, 664n.

w 2. To take testimony, etc.—see sec. 259, subd. 2; 9 Cal.

643n.

hen the parties do not consent, the court may,
 plication of either, or of its own motion, dis-
 nce in the following cases:

he trial of an issue of fact requires the exam-
 long account on either side, in which case the
 y be directed to hear and decide the whole



issue, or report upon any specific question of fact involved therein;

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;

4. When it is necessary for the information of the court in a special proceeding.

Reference generally—sec. 638*n*.

Compulsory reference—unauthorized, 1 Cal. 336: order for, 2 Cal. 249; 9 Cal. 353: and as to power to make, under Constitution, see sec. 631*a*.

SUBDIVISIONS 1 and 2. Account—19 Cal. 140; 28 Cal. 302; 32 Cal. 397; 38 Cal. 385: whole issue, 24 Cal. 424.

SUBDIVISION 3. Collateral question—see 41 Cal. 394.

SUBDIVISION 4. Special proceeding, for—generally, see secs. 1063, 1822.

§ 640. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending.

Reference ordered—see secs. 638, 639, and notes.

Three referees—two may act, sec. 1053.

Court commissioner—sec. 259, subd. 2.

§ 641. Either party may object to the appointment of any person as referee, on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror;

2. Consanguinity or affinity, within the third degree, to either party;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party; or being a member of the family of either party; or a partner in business with either party; or being security on any bond or obligation for either party;

4. Having served as a juror or been a witness on any trial between the same parties, for the same cause of action;

t on the part of such person in the event of the
the main question involved in the action;
formed or expressed an unqualified opinion
to the merits of the action;
existence of a state of mind in such person
impartiality against or bias to either party.
to referee—compare sec. 602.

the objections taken to the appointment of any
referee must be heard and disposed of by the
court. Objections may be read and witnesses examined
on objections.
—see sec. 641 and note.

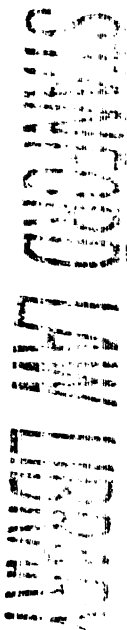
the referees or commissioner must report their
findings in writing to the court, within twenty days after
the trial is closed, and the facts found and conclu-
sions must be separately stated therein.
—see secs. 640-642. Reference—secs. 638, 639. Commis-
sioner, subd. 2. Report—1 Cal. 45, 362; 2 Cal. 322; 3 Cal. 406,
228; 9 Cal. 213; 23 Cal. 451; 30 Cal. 280; account, as to, 32
Cal. 378. Findings—sec. 633*n*. Twenty days—merely di-
rectly, 471, and compare sec. 632*n*.

the finding of the referee or commissioner upon
the issue must stand as the finding of the court, and
the finding of the clerk of the court, judge,
or justice entered thereon in the same manner as if
it had been tried by the court.

referee—effect of, see REPORT, sec. 643*n*; *whole issue*
tried, 424. Judgment entered thereon—3 Cal. 406; 31 Cal. 333.

the finding of the referee or commissioner may
be set aside and reviewed in like manner as if made by
the court. When the reference is to report the facts, the
report has the effect of a special verdict.

findings excepted to and reviewed—2 Cal. 72, 122; 4 Cal.
130, 453; 7 Cal. 50; 9 Cal. 213, 353; 22 Cal. 471; 47 Cal. 378; 49
options generally, secs. 646 *et seq.*; new trials, sec. 656 *et*
commissioner's report, time and mode of excepting to, sec.
1 Cal. 393. Reporting the facts—see REPORT, sec. 643*n*.



CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

ART. I. EXCEPTIONS. II. NEW TRIALS.

ARTICLE I.

EXCEPTIONS.

646. Exceptions may be taken. Time when taken, etc.
 647. What deemed excepted to.
 648. Exception, form of.
 649. Exceptions signed by judge and filed with clerk.
 650. Exceptions not presented at time of ruling. Notice to adverse party, how settled upon, etc.
 651. Exceptions after judgment, etc.
 652. When exception is refused, application to Supreme Court to prove the same, etc.
 § 653. Proceedings when judge ceases to hold office.

§ 646. An exception is an objection upon a matter of law to a decision made, either before or after judgment by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in sec. 647. [Approved April 3rd, 1876—in effect June 1st, 1876]

Immediate taking—of exception, see TIME OF DECISION, under Exceptions, *infra*. Matters deemed excepted to—sec. 647.

EXCEPTIONS.

Absence of party—as affecting, sec. 647 and note. Amending—sec. 650. Appellate court—first raising objections in, 5 Cal. 409, 478; 6 Cal. 415; 7 Cal. 584; 9 Cal. 562; 10 Cal. 258; 13 Cal. 521; 16 Cal. 173, 184, 535; Cal. 533; 23 Cal. 58; 25 Cal. 225; 26 Cal. 547; 31 Cal. 225; 34 Cal. 580; Cal. 293, 363; 47 Cal. 9; 49 Cal. 103; 50 Cal. 444; 52 Cal. 225; review in, Cal. 98, 162, 167. Bill of exceptions—secs. 650-653. Certifying—sec. 650. Charge to—essential, 49 Cal. 340; specific, see that head. Continuance, refusal of—reviewing, 47 Cal. 98, 162; deemed excepted to, sec. 647. Decision—to, see TAKEN, to what. Deemed made, when—sec. 647. Default, order opening—*Review of*, 47 Cal. 167. *Definition of*, sec. 646, *supra*; 32 Cal. 304; 34 Cal. 682; 38 Cal. 141. Drafting—sec. 650. Evidence, objection to—*admitted*, subject to exception, 7 Cal. 33. *Incompetent*, 18 Cal. 315; 48 Cal. 335; 50 Cal. 142. *Immaterial*, 48 Cal. 333. Estate of Brooks, March 31st, 1880, 5 Pac. C. Law J. 236. *Irrelevant*, Cal. 157; 18 Cal. 83; 47 Cal. 588; 50 Cal. 142, 176. *Motion to strike out*, Cal. 274, 444; 46 Cal. 560; 47 Cal. 294; 50 Cal. 176. *Rejection of*, 15 Cal. 50.

l. 259. Filing—see SETTLEMENT OF. Findings, to—
 immediate taking of—see TIME OF DECISION. Imma-
 to—see EVIDENCE. Incompetent evidence, to—see
 relevant evidence, to—see EVIDENCE. Manner of
 TAKEN, *how*. Preparing—see SETTLEMENT OF. Pro-
 SETTLEMENT OF. Reason—of immediate taking, see
 SION. Record, appearance in—secs. 649, 650; 5 Cal. 258,
 11 Cal. 142; 48 Cal. 537, 646. Rejection of evidence, to—
 Repeating—39 Cal. 614. Requisites—of bill of excep-
 Reviewing—see APPELLATE COURT. Settlement of
 Signing—see SETTLEMENT OF. Specific, must be—
 rejection of evidence, to, 7 Cal. 38; 10 Cal. 32, 267; 12 Cal.
 15; 15 Cal. 50; 16 Cal. 224; 18 Cal. 315; 19 Cal. 640; 23 Cal.
 399, 459; 25 Cal. 619; 34 Cal. 554; 46 Cal. 392; 48 Cal. 335,
 552; 50 Cal. 142, 176; *Rider v. Edgar*, Feb. 6th, 1880, 4 Pac.
 arge, to, 25 Cal. 123; 44 Cal. 246, 414; 47 Cal. 348; 48 Cal.
 verdict, to, sec. 648. Stating—see TAKEN, *how*. Strik-
 ace—motion for, see EVIDENCE. Taken—to *what*, 23
 141, and see sec. 647. *How*, see secs. 648, 1051*n*, and 28
 , see TIME OF DECISION. Time of decision—taking
 Cal. 122; 5 Cal. 339, 467; 7 Cal. 423; 8 Cal. 574; 12 Cal. 453;
 Cal. 393; 23 Cal. 66, 354, 418; 24 Cal. 359; 25 Cal. 123, 398; 26
 l. 214; 32 Cal. 102; 33 Cal. 542; 35 Cal. 398; 36 Cal. 310; 45
 Cal. 387; 48 Cal. 152, 346, 555, 637; 49 Cal. 105; and see AP-
 RT: Reason of rule, 5 Cal. 339, 467; 7 Cal. 423. Unnec-
 27, and see sec. 647. Waiver—5 Cal. 40; 14 Cal. 544; and
 see 43 Cal. 274, 444; 46 Cal. 560; 47 Cal. 294; 48 Cal. 153; 50
 447; also see APPELLATE COURT, and TIME OF DE-
 ht of evidence, to—see EVIDENCE.

the verdict of the jury, the final decision in an
 proceeding, an interlocutory order or decision,
 termining the rights of the parties, or some of
 der or decision from which an appeal may be
 order sustaining or overruling a demurrer, al-
 refusing to allow an amendment to a pleading,
 a pleading or a portion thereof, refusing a
 ; an order made upon *ex parte* application,
 r or decision made in the absence of a party,
 to have been excepted to. [Approved April
 t June 1st, 1876.]

a of section—47 Cal. 167. Decisions deemed excepted
 party, *in*, Amdt. 1876; formerly otherwise, 35 Cal. 398.
 eading, ruling on, see sec. 473*n*. *Appealable order*, see
 d note. *Continuance, refusing*: granting, also, before
 view of, see EXCEPTIONS, sec. 646*n*. *Demurrer, ruling*
 d note. *Ex parte order*, secs. 166, 259, subd. 1. *Final*
 d, 1 Cal. 134; sec. 648*n*; and generally, see JUDGMENT,
 te, sec. 664*n*: exception presumed, 34 Cal. 682: appeal
 and note. *Interlocutory order or decision*, defined, 1 Cal.
 1003: decision, sec. 643*n*: review of, on appeal, sec. 939*n*,
 sec. 956*n*. *Striking out pleading*, sec. 453 and notes.
 24-628.

o particular form of exception is required, but
 ception is to the verdict or decision, upon the
 v. PROC.—20.

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ground of the insufficiency of the evidence to justify the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto, sufficient to identify them, may be made. [Approved April 3rd, 1876—in effect June 1st, 1876.]

Verdict or decision—on insufficient evidence. *Decision*, meaning of, 49 Cal. 42, 552; 51 Cal. 110. *Insufficiency of evidence*, see EVIDENCE under Exceptions, sec. 646n. *Specifying particulars*, see *infra*. **Specifying particulars—of insufficiency of evidence**, see SPECIFIC, under Exceptions, sec. 646n; 49 Cal. 552; 50 Cal. 129, 508, 523; 51 Cal. 180; *Ridgely v. Edgar*, Feb. 6th, 1880, 4 Pac. C. L. J. 545; *Douglas v. Fulda*, No. 61 Feb. 9th, 1880, § Pac. C. L. J. 18; same as to statement, sec. 659.

§ 649. A bill containing the exception to any decision may be presented to the court or judge for settlement, at the time the decision is made, and after having been settled, shall be signed by the judge and filed with the clerk. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions shall be presented to, and settled and signed by such tribunal or officer. [Approved April 3rd, 1876—in effect June 1st, 1876.]

Settlement of bill of exceptions—sec. 650n.

Filed with clerk—when, 49 Cal. 585.

At time of decision—47 Cal. 640; see also, 5 Cal. 149.

§ 650. When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such service the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk he must immediately

to the judge, if he be in the county; if he be out of the county, and either party desire them to be forwarded to the judge, the clerk must, upon the writing of such party, immediately forward them by mail, or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immediately on his return to the county. When received by the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time so designated, the judge must settle the bill. If the bill is tried before a referee, the proposed bill, with amendments, if any, must be presented to such referee within ten days after service of the bill, upon notice of five days to the adverse party. Hereupon the referee shall settle the bill. If amendments are served, or if served are allowed, the bill may be presented, with the amendments, if any, to the judge or referee, for settlement, without the presence of the adverse party. It is the duty of the judge, in settling the bill, to strike out of it all redundant and unnecessary matter, so that the exceptions may be stated as briefly as possible. When settled, the bill must be returned by the judge or referee, with his certificate that the same is allowed, and shall then be filed by the clerk. [In effect July 1st, 1874.]

—sec. 1054; 50 Cal. 444.

—24 Cal. 228, and see next note.

Settlement—47 Cal. 640, 643; 50 Cal. 444: in criminal case,

—see THEN BE FILED, *infra*.

Bill of exceptions to the judgment of the judge—5 Cal. 148. *Revoking*, 9 Cal. 172; 47 Cal. 526: but see note on terms, see sec. 73n.

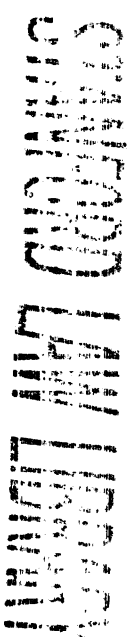
—49 Cal. 535.

Bill of exceptions for, sec. 659, subd. 2.

Bill of exceptions, sec. 648; 1 Cal. 108; 3 Cal. 426; 5 Cal. 138; 13 Cal. 141; 45 Cal. 25; 46 Cal. 545; 49 Cal. 210, 581; 50 Cal. 444: for new trial, sec. 259, subd. 2: and as to statement, see sec. 661n.

Bill of exceptions to any decision made after judgment is presented to the judge at the time of such trial, shall be settled or noted, as provided in sec. 649, and hereof may be presented and settled after the time provided in sec. 650, and within like periods of time of the order, upon appeal from which such appeal is reviewable. [In effect July 1st, 1874.]

Bill of exceptions to judgment—compare sections named.



§ 652. If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same; the application may be made in the mode and manner, and under such regulations as the court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

Refuse—49 Cal. 510.

Petition—35 Cal. 227; 49 Cal. 263.

Regulation—see Supreme Ct. Rule 29.

§ 653. When the decision excepted to was made by any judicial officer other than a judge, the bill of exceptions shall be presented to such judicial officer and settled and signed by him, in the same manner as it is required to be presented to, settled, and signed by a court or judge. A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the State, or refuses to settle the bill of exceptions, or no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may by its order or rules direct. Judges, judicial officers, and the Supreme Court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions. [Approved April 3rd—in effect June 1st, 1876.]

Order or rules—see SETTLEMENT, under Supreme Court Rules, sec. 129n.

ARTICLE II.

NEW TRIALS.

§ 656. New trial defined.

§ 657. When a new trial may be granted.

§ 658. On what papers moved for.

§ 659. Notice of motion, upon whom served, and what to contain.

§ 660. Motion to be heard at the time specified, or dismissed.

§ 661. Judge to make statement on decision of the motion. The statement to constitute bill of exceptions.

§ 656. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees.

New trial—see note to next section.

§ 657. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly-discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law, occurring at the trial and excepted to by the party making the application.

NEW TRIAL.

Admissions preventing—see ESTOPPEL. Affidavits—on motion for, sec. 659, subd. 1 and note; also see Grounds, *infra*, subd. 2, 4. Appeal—as affecting, sec. 53n. Application for—mode of, secs. 653, 659; and see MOTION FOR. Argument for—see under MOTION FOR. Chance, resort to—sec. 657, subd. 2, and note under GROUNDS, *infra*. Conflict of evidence—effect of, see Grounds, note, *infra*, subd. 6. Damages, excessive—sec. 657, subd. 5, and note under Grounds, *infra*. Defined—sec. 656. Diligence—proof of, see Grounds note, *infra*, subd. 4; in prosecution, sec. 660 and note. Discretion—extensive, abuse of alone causes interference, 2 Cal. 177, 353; 5 Cal. 84; 10 Cal. 301; 11 Cal. 340; 12 Cal. 432; 15 Cal. 35, 90, 501; 16 Cal. 357; 17 Cal. 92, 285, 416; 18 Cal. 203; 20 Cal. 196; 21 Cal. 413; 22 Cal. 82; 23 Cal. 243; 26 Cal. 581; 28 Cal. 435; 30 Cal. 226; 33 Cal. 522; 41 Cal. 467; 43 Cal. 646; 49 Cal. 250; Kern Valley Bank v. Chester, June 3rd, 1880; also see subd. 1 of this section, and under Grounds *infra*, note to same, and to subd. 3, 4, and 6; in other matters, 15 Cal. 23; 19 Cal. 605; 23 Cal. 43; Parrot v. Floyd, April 17th, 1880, 5 Pac. C. L. J. 333. Equity, in—extent of interference, sec. 473a; 5 Cal. 400, 448; 7 Cal. 50; 29 Cal. 444; 33 Cal. 31; 41 Cal. 247, 318; 45 Cal. 234; practice, 7 Cal. 50; 14 Cal. 223; 18 Cal. 42; 49 Cal. 126; 50 Cal. 166. Errors in law—sec. 657, subd. 7, and note under Grounds, *infra*. Estoppel—by admissions on record, 40 Cal. 92. Exceptions—sec. 646n: on bill of, sec. 659, subd. 2. Granting—see ORDER FOR. Grounds of—see note, *infra*. Insufficiency of evidence for—sec. 657, subd. 6, and note under Grounds, *infra*. Intendments—favoring proceedings be-

low, see sec. 53*n*; also DISCRETION, *supra*. Irregularity, for—sec. 657 subd. 1, and see note under Grounds, *infra*. Law—verdict against sec. 657, subd. 7, and note under Grounds, *infra*: errors in, see this head, *supra*. Minutes of court, on—sec. 659, subd. 4, sec. 660. Misconduct of jury—sec. 657, subd. 2, and see note under Grounds, *infra*. Motion for—argument on, see under HEARING, sec. 660*n*; 47 Cal. 16; court's instance, at, sec. 662; hearing, sec. 660; necessary, when, 8 Cal. 101; 14 Cal. 81; 15 Cal. 375; 18 Cal. 394; 19 Cal. 302; 38 Cal. 72; notice of sec. 659; papers on, sec. 658; questions on, 47 Cal. 162. Newly-discovered evidence for—sec. 657, subd. 4, and see note under Grounds, *infra*. Notice of motion for—sec. 659. Order, for—effect of, 33 Cal. 407; 43 Cal. 452; made on terms, 1 Cal. 378; 13 Cal. 54; 46 Cal. 576; 47 Cal. 264; 43 Cal. 132. Statement, for—sec. 659, subd. 3 and note; on appeal from ruling as to, sec. 661 and note. Substantial rights—interference with sec. 157, and see Grounds, *infra*, subd. 7. Surprise, for—sec. 657, subd. 3, and note under Grounds, *infra*. Waiver of—8 Cal. 510; 4 Cal. 164.

GROUND FOR NEW TRIAL.

SUBDIVISION 1. Irregularity in proceedings—Of court—see ABUSE OF DISCRETION, etc., *infra*, and 1 Cal. 102, 131; 14 Cal. 661; 23 Cal. 335; 27 Cal. 228; 35 Cal. 346; 47 Cal. 76; 51 Cal. 468; Preston v. Eureka A. S. Co. Feb. 23rd, 1880, 5 Pac. O. L. J. 52; Estate of Brooks, March 31st, 1880, 5 Pac. C. L. J. 236. Of jury—4 Cal. 274; 9 Cal. 529; 10 Cal. 196; 12 Cal. 483; 16 Cal. 77; 20 Cal. 432; 21 Cal. 337; 22 Cal. 348; 29 Cal. 237; 43 Cal. 137; 45 Cal. 114; and for misconduct of jury, see subd. 2 and note *infra*. Of adverse party—see Abuse of discretion, etc., *infra*. Abuse of discretion, or prejudicial order, 10 Cal. 464; 11 Cal. 161; and see DISCRETION, under New Trial, *supra*.

SUBDIVISION 2. Misconduct of jury—What constitutes, 6 Cal. 228; 9 Cal. 529; 10 Cal. 92; 21 Cal. 337; 39 Cal. 370, 625; 40 Cal. 603; 41 Cal. 238; 46 Cal. 355. Chance, resort to, determination of, 5 Cal. 44; 23 Cal. 40; 25 Cal. 397, 460; 39 Cal. 435; affidavits showing, sufficiency of, 5 Cal. 44; 49 Cal. 274; impeaching verdict, see 1 Cal. 403; 4 Cal. 102; 5 Cal. 40, 44; 15 Cal. 70; 25 Cal. 397, 460; 29 Cal. 257; 49 Cal. 274; 50 Cal. 438; 53 Cal. 490.

SUBDIVISION 3. Surprise—What constitutes, 5 Cal. 137; 6 Cal. 228; 9 Cal. 568; 10 Cal. 523; 13 Cal. 220; 21 Cal. 397; 22 Cal. 160; 24 Cal. 85; 28 Cal. 335; 35 Cal. 346; 39 Cal. 447; 40 Cal. 264, 657; 41 Cal. 494; Preston v. Eureka A. S. Co., Feb. 23rd, 1880, 5 Pac. O. L. J. 52. Abuse of discretion, required, 2 Cal. 183; 15 Cal. 501; 16 Cal. 85; 19 Cal. 355; 30 Cal. 226; 49 Cal. 699; and see under New Trial, *supra*. Showing of, when sufficient, see What constitutes, *supra*, and following heads: Material injury, 6 Cal. 228; 17 Cal. 385; 19 Cal. 28; 24 Cal. 237; 29 Cal. 562; 32 Cal. 208; Relief, exhausted, 7 Cal. 40; 11 Cal. 21; 17 Cal. 385; 20 Cal. 442; 29 Cal. 605; 38 Cal. 456; 39 Cal. 555; 47 Cal. 416; Kern Valley Bank v. Chester, June 3d, 1880, 5 Pac. C. L. J. 500; Ordinary prudence, observance of, 1 Cal. 429; 3 Cal. 113; 10 Cal. 510; 21 Cal. 397; 29 Cal. 605. Accident, see previous notes on this subdivision, and 49 Cal. 669.

SUBDIVISION 4. Newly-discovered evidence—Showing of, contents of affidavits, 1 Cal. 180, 429; 3 Cal. 55, 113, 396; 11 Cal. 194; 35 Cal. 684; Stoakes v. Monroe, 36 Cal. 383; 38 Cal. 194; 50 Cal. 632. Material, see Cumulative. Diligence, proof of, 6 Cal. 164; 11 Cal. 104, 212; 22 Cal. 160; 33 Cal. 99; 38 Cal. 585; 40 Cal. 74; 45 Cal. 92, 337. Cumulative, not merely, see sec. 1835; 5 Cal. 342; 6 Cal. 228; 7 Cal. 40; 22 Cal. 160, 596; 23 Cal. 419; 24 Cal. 513; 34 Cal. 515; 35 Cal. 41; 38 Cal. 456, 584; 41 Cal. 494; 45 Cal. 337; 47 Cal. 134, 194, 204; 49 Cal. 250. Too late for trial, 7 Cal. 418. Discretion of court below, 4 Cal. 345; 16 Cal. 173; 23 Cal. 243; 41 Cal. 463; and see ABUSE OF DISCRETION, under New Trial, *supra*. In equity, 5 Cal. 399.

ION 5. Excessive damages—Passion or prejudice, 1 Cal. 326; 5 Cal. 410; 6 Cal. 228, 681; 23 Cal. 196; 24 Cal. 513; 35 Cal. 463, 590; 41 Cal. 364; 42 Cal. 215; 44 Cal. 43; 45 Cal. 337; *Siemors v. Eisen*, March 24th, 1880, 5 Pac. C. L. J. 248. *Reversed*, 4 Cal. 381; 8 Cal. 294; 14 Cal. 419; 19 Cal. 28; 20 Cal. 196; 46 Cal. 323; 49 Cal. 131; 50 Cal. 243. *Damages too small*, 33 Cal. 26. *Objection too late*, 14 Cal. 194; 41 Cal. 472, 515. *Damages*—Civil Code, secs. 3281-3360. *Damages in various*—amendment, 6 Cal. 413; 14 Cal. 117; appeal, frivolous, on, sec. 426n; see COMPLAINT, sec. 426n; bond, indemnity, on, section, sec. 667n; death, for causing, sec. 377; detainer, un-**FORCIBLE ENTRY:** ejectment, secs. 740, 741; embezzling 1458-1560; executor, fraudulently selling realty, sec. 1572; see **SEDUCTION:** forcible entry, secs. 735, 1174; forfeiture, 79; libel or slander, sec. 461; liquidated, sec. 1572; mandamus, 1095; nuisance, sec. 731; penal, secs. 732, 733, 735, 1174, 1453-levin, see **CONVERSION:** seduction, sec. 374; special, see **striking out**, see **AMENDMENT:** treble, see **PENAL:** trespasser, secs. 733, 734; usurpation of office, sec. 807; waste,

ION 6. Insufficient evidence—Substantial conflict, no in- 4 Cal. 132; 4 Cal. 102; 8 Cal. 443; 9 Cal. 16; 12 Cal. 426; 17 Cal. 78; 23 Cal. 193; 24 Cal. 419; 27 Cal. 228; 29 Cal. 492; 30 Cal. 662; 30, 558; 33 Cal. 202, 650; 36 Cal. 151; 37 Cal. 40, 59; 38 Cal. 78; 36 Cal. 590; 47 Cal. 76, 267, 585; 48 Cal. 114, 535, 646; 49 Cal. 90, 585; 50 Cal. 304; 51 Cal. 172; 52 Cal. 563; 53 Cal. 577; *Butler* ay 26th, 1880, 5 Pac. C. L. J. 445; *Forbes v. McDonald*, Jan. (Harpstein, J., concurring) 4 Pac. C. L. J. 501; *DuBrutz v. 3rd*, 1880, 4 Pac. C. L. J. 506; *Williams v. Hill*, March 17th, L. J. 184; *Williams v. Hartford F. Ins. Co.* March 29th, 1880, J. 227; *La Soc. Fr. d'Ep. etc. v. Beard*, March 31st, 1880, 5 273; *Green v. Chaudler*, April 22nd, 1880, 5 Pac. C. L. J. 387; *Thomas*, May 1st, 1880; 5 Pac. C. L. J. 343; *De La Guerra v. ay 15th*, 1880, 5 Pac. C. L. J. 413; *Wakefield v. Bouton*, July ac. C. L. J. 574; *Myers v. Spooner*, July 8th, 1880, 5 Pac. C. L. *dict.* conclusiveness of, 1 Cal. 337; 5 Cal. 84; 10 Cal. 446, 508; 2; 15 Cal. 162; 23 Cal. 219; 24 Cal. 419; 38 Cal. 78; 48 Cal. 647; *depositions*, see 33 Cal. 60; 48 Cal. 546; 50 Cal. 168. *Other de- ty of*, decision of fact only, 49 Cal. 42; findings of jury, 14 *port of referee*, 1 Cal. 362; 5 Cal. 228; 13 Cal. 620; 20 Cal. 520; 25 Cal. 175; 49 Cal. 173; and as to review of, see 19 Cal. 607; *court*, 1 Cal. 180, 186, 373; 3 Cal. 284; 14 Cal. 194; 16 Cal. 73; 23 Cal. 338; 26 Cal. 514; 33 Cal. 356; 34 Cal. 516; 35 Cal. 129, 646; 40 Cal. 165, 386; 41 Cal. 519; 42 Cal. 298, 358; 44 Cal. 43; 48 Cal. 668. *Supporting evidence*, sufficiency of, 9 Cal. 94; 13 Cal. 643; 16 Cal. 76; 20 Cal. 83; 21 Cal. 400; 25 Cal. 437; 29 Cal. 164; 34 Cal. 389, 565, 687; 40 Cal. 639; 44 Cal. 3, 200; 46 Cal. 385, 576; 47 Cal. 100, 335, 632; 49 Cal. 294, 374; 50 Cal. 222, 631; 52 Cal. 455; *utter insufficiency*, 12 Cal. 88; 20 Cal. 48; 23 Cal. 539; 28 Cal. 571; 48 Cal. 118; 49 Cal. 374. *Abuse of discretion*, requisite, 4 ; 16 Cal. 392; 17 Cal. 92; 21 Cal. 413; 22 Cal. 248; 23 Cal. 124; 28 Cal. 615; 32 Cal. 332; 39 Cal. 407; 41 Cal. 467; 44 Cal. 139; 46 Cal. 536; 49 Cal. 586; 50 Cal. 187. *Review, mode of*, under l. 42; 50 Cal. 508; before Code, 2 Cal. 120; 13 Cal. 598; 14 Cal. 595; 27 Cal. 68, 470; 29 Cal. 390; 30 Cal. 280; 32 Cal. 450; 33 Cal. 628; 42 Cal. 439; 45 Cal. 247; specifying particulars, sec. 648 ec. 659n; 35 Cal. 30, 218; 39 Cal. 24; 47 Cal. 18; 49 Cal. 294, 340, Cal. 187; 51 Cal. 198, 219, 554.

aw—39 Cal. 24; 40 Cal. 543; 49 Cal. 46.

ION 7. Errors in law—What constitute, see following sub- *ence*, admission or rejection of, 1 Cal. 92, 231; 16 Cal. 392;

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20 Cal. 437; 21 Cal. 215; 22 Cal. 185, 255; 25 Cal. 61; 26 Cal. 310; 38 Cal. 2
 46 Cal. 29; 47 Cal. 93, 485; 53 Cal. 436; *Noe v. Spivale*, Feb. 26th, 18
 Donnelly v. Curran, March 18th, 1880, 5 Pac. C. L. J. 215; *Williams*
Hartford Fire Ins. Co. March 29th, 1880, 5 Pac. C. L. J. 227; *Estate*
Toomes, April 17th, 1880, 5 Pac. C. L. J. 286; *Witherby v. Thomas*, M
 1st, 1880, 5 Pac. C. L. J. 343; *People v. Smallmans*, May 15th, 1880, 5 Pa
 C. L. J. 475; *Tracy v. Colby*, June 11th, 1880, 5 Pac. C. L. J. 534; *Tracy*
Craig, June 22nd, 1880; *People, etc. v. Brite*, June 12th, 1880, 5 Pac.
 L. J. 616. *Instructions*, as to, 1 Cal. 353; 2 Cal. 385; 5 Cal. 342, 478; 8 C
 341; 9 Cal. 565; 13 Cal. 42, 58; 22 Cal. 42; 25 Cal. 230; 32 Cal. 131; 47 C
 93, 96; 50 Cal. 235, 285, 482; 52 Cal. 315, 465, 611; 53 Cal. 40, 630, 693, 7
 720; *People v. Wong Ah Ngow*, Feb. 10th, 1880, 4 Pac. C. L. J. 55
Black v. Sprague, March 6th, 1880, 5 Pac. C. L. J. 92; *Watson v. D*
mon, March 6th, 1880, 5 Pac. C. L. J. 97; *People v. Ah Chung*, Mar
 22nd, 1880, 5 Pac. C. L. J. 218; *Williams v. Hartford Fire Ins. Co.* Mar
 29th, 1880, 5 Pac. C. L. J. 227; *McFadden v. Mitchell*, April 22nd, 1880, 5 Pa
 C. L. J. 334; *People v. Smallmans*, May 15th, 1880, 5 Pac. C. L. J. 47
People v. Kennedy, May 24th, 1880, 5 Pac. C. L. J. 418; *Sargent v. Lih*
den G. Mg. Co. May 25th, 1880, 5 Pac. C. L. J. 404; *People v. Miles*, Ma
 26th, 1880, 5 Pac. C. L. J. 420. *Findings*, sec. 633n; 47 Cal. 20; 51 Cal. 62
 52 Cal. 73; *Kelly v. McKibben*, Feb. 21st, 1880, 5 Pac. C. L. J. 38. *Jud*
ment, 50 Cal. 253. *Various particulars*, *Sherman v. McCarthy*, Marc
 3rd, 1880, 5 Pac. C. L. J. 58. *Affirmative showing necessary*, 2 Cal. 145;
 Cal. 381; 5 Cal. 319, 409; 23 Cal. 385; 26 Cal. 149, 393; 31 Cal. 238; 39 Ca
 690; 47 Cal. 416; 48 Cal. 191, 537; 50 Cal. 166; 51 Cal. 222; specifying partic
 ulars, see sec. 659, subds. 3, 4, and notes; also, 10 Cal. 298; 25 Cal. 478; 3
 Cal. 263; 47 Cal. 18; exceptions, sec. 646n; abuse of discretion requisite
 16 Cal. 357; 49 Cal. 32, 233, 425; 52 Cal. 277; 53 Cal. 50, and see DISCRETION
 under *New trial*, note, *supra*. *Prejudicial*, must be, 2 Cal. 145, 381; 1
 Cal. 383; 14 Cal. 39; 15 Cal. 304; 17 Cal. 294; 18 Cal. 416, 629; 21 Cal. 280
 22 Cal. 255; 23 Cal. 15, 404, 468; 24 Cal. 339; 25 Cal. 460, 504; 26 Cal. 129, 149
 455; 28 Cal. 188, 406; 29 Cal. 615, 644; 30 Cal. 394, 425; 32 Cal. 102; 33 Cal
 230, 290, 647; 34 Cal. 176, 248, 321; 35 Cal. 129, 302, 679; 39 Cal. 625; 44 Cal
 182, 195; 45 Cal. 287, 379, 522; 46 Cal. 248; 47 Cal. 30, 388, 535; 48 Cal. 93, 152
 410, 433; 49 Cal. 6, 263, 374, 388, 577, 632; 50 Cal. 129, 137, 166, 176, 195, 289, 624;
 51 Cal. 180, 198; 52 Cal. 171; 53 Cal. 491, 574; *Hansen v. Martin*, March 18th,
 1880, 5 Pac. C. L. J. 193; *People v. Ah Chung*, March 22nd, 1880, 5 Pac. C.
 L. J. 218; *Siemers v. Eisen*, March 24th, 1880, 5 Pac. C. L. J. 248; *For*
syth v. Bower, April 27th, 1880, 5 Pac. C. L. J. 337; *Wetherby v. Thomas*,
 May 1st, 1880, 5 Pac. C. L. J. 343; *Chester v. Bower*, May 29th, 1880, 5
 Pac. C. L. J. 450; injury presumed from error shown, 14 Cal. 19, 91; 15
 Cal. 63; 17 Cal. 37, 166; 18 Cal. 187; 25 Cal. 167, 230; 28 Cal. 540; 30 Cal. 394;
 39 Cal. 609; 40 Cal. 249; 47 Cal. 103, 119; 50 Cal. 628; 51 Cal. 222.

§ 658. When the application is made for a cause men-
 tioned in the first, second, third, and fourth subdivisions
 of the last section, it must be made upon affidavits; for
 any other cause it may be made, at the option of the mov-
 ing party, either upon the minutes of the court, or a bill
 of exceptions, or a statement of the case, prepared as
 hereinafter provided. [In effect July 1st, 1874.]

Effect of Code on section—47 Cal. 58.

Mode of application—affidavits, on, sec. 659, subd. 1: minutes of
 court, on, sec. 659, subd. 4: bill of exceptions on, sec. 659, subd. 2: state-
 ment of case, on, sec. 659, subd. 3.

§ 659. The party intending to move for a new trial
 must, within ten days after the verdict of the jury, if the
 action were tried by a jury, or after notice of the decision

of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case:

1. If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter affidavits, a copy of which must be served upon the moving party.

2. If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as is provided after the entry of judgment, or after receiving notice of such entry by sec. 650, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion.

3. If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same, or a copy thereof, upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk, and judge, as are required for the settlement of bills of exception by sec. 650. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time des-

igned, or, if served, are allowed, the proposed statements and amendments, if any, may be presented to the judge or referee, for settlement, without notice to the adverse party. When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion. It is the duty of the judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant and useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.

4. When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specification here indicated, when the motion is made on the minutes of the court, the motion must be denied. [In effect July 1st, 1874.]

Within ten days—see NOTICE OF MOTION, *infra*.

Verdict of jury—secs. 624-628.

Notice of decision—30 Cal. 123; 33 Cal. 208; 43 Cal. 320; 50 Cal. 375. meaning of "decision," see 49 Cal. 565.

Notice of motion for new trial—*Written*, must be, 24 Cal. 354, 364. *Abandonment*, 19 Cal. 602. *Waiver*, 9 Cal. 76; 23 Cal. 151; 41 Cal. 619; 42 Cal. 485; 52 Cal. 664. *Filing and serving of papers*, generally, sec. 1010 *et seq.*: initiates proceedings, 47 Cal. 58. *Time for, mandatory*, 9 Cal. 67; 15 Cal. 313; 24 Cal. 354; 45 Cal. 654; 47 Cal. 105, 552; 50 Cal. 370; extension of time, sec. 1054; excepting to court commissioner's report, sec. 259, subd. 2. *Designating grounds*, see SPECIFYING PARTICULARS, note *infra*.

Proceedings, limited time for—11 Cal. 132; 27 Cal. 491; 28 Cal. 262; 43 Cal. 320, 482; 50 Cal. 370; 52 Cal. 664: extensions of time, sec. 1054; 41 Cal. 515; 43 Cal. 320.

Specifying particulars—27 Cal. 415; 28 Cal. 312; 30 Cal. 229; 32 Cal. 302, 639; 34 Cal. 90, 624; 36 Cal. 117; 37 Cal. 263, 381; 38 Cal. 201, 278; 39 Cal.

23, 700; 40 Cal. 77, 639; 41 Cal. 298; 42 Cal. 439; 43 Cal. 274, 398; 44 Cal. 210, 285, 284; 46 Cal. 3, 33, 530; 47 Cal. 19, 416; 48 Cal. 614; 49 Cal. 42, 146, 186, 224, 224; 50 Cal. 120, 187; 51 Cal. 221; *Rider v. Edgar*, Feb. 6th, 1880, 4 Pac. C. L. J. 545; *Preston v. Hearst*, March 16th, 1880, 5 Pac. C. L. J. 128; *Thompson v. Patterson*, April 23rd, 1880, 5 Pac. C. L. J. 390.

SUBDIVISION 1. Affidavits—time for filing, see **PROCEEDINGS, LIMITED TIME FOR**, note, *supra*: further time, sec. 1054: filing, etc., of papers, sec. 1010 *et seq.*: indorsement, 43 Cal. 542.

SUBDIVISION 2. Bill of exceptions—settlement, requisites, etc., see sec. 650*n*, secs. 649-653: filed before signed, 49 Cal. 535: specifying particulars, see note, *supra*.

SUBDIVISION 3. Statement—preparation and settlement of, 44 Cal. 28; 50 Cal. 120; and compare sec. 650 and notes: engrossed statement, incorporating amendments, 23 Cal. 461; *Smith v. Davis*, May 19th, 1880, 4 Pac. C. L. J. 449: judge's certificate, sec. 661*n*; 13 Cal. 170; 44 Cal. 246; and compare, 14 Cal. 194: clerk's duty, 13 Cal. 170; 40 Cal. 142: mistake as to, 42 Cal. 236; 44 Cal. 210: omission in, 34 Cal. 506: striking out, *improper*, 42 Cal. 110: time for filing, 47 Cal. 164; 51 Cal. 172; and see **PROCEEDINGS, supra**: specifying particulars, see note, *supra*: reserving objection, 43 Cal. 320.

SUBDIVISION 4. Minutes of court—motion on, sec. 660: specifying particulars, see note, *supra*.

§ 660. The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file. [In effect July 1st, 1874.]

Earliest practicable period—diligence required, 27 Cal. 413; 32 Cal. 65; 45 Cal. 669: discretion of court, 37 Cal. 236; 39 Cal. 434; 44 Cal. 389: waiver, 47 Cal. 645.

Brought to a hearing—see **WAIVER**, under preceding note.

Hearing—*Arguments on*, 28 Cal. 99; 47 Cal. 163; 49 Cal. 46. *Premature order on*, 41 Cal. 331; 42 Cal. 218, 362. *Dismissal on motion*, 48 Cal. 646.

§ 661. The judgment roll and the affidavits, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal. Such subsequent statement shall be proposed by the party appealing, or intending to appeal, within ten days after the entry of the order, or such further time as the court in

which the action is pending, or a judge thereof, may allow, and the same or a copy thereof be served upon the adverse party, who shall have ten days thereafter to prepare amendments thereto, and serve the same, or a copy thereof, upon the party appealing, or intending to appeal, and thereafter proceedings shall be had, and within like periods, for the settlement of the statement as provided by sec. 659, but the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement. [In effect July 1st, 1874.]

Judgment roll—sec. 670; *Thomas v. Anderson*, May 26th, 1880, 5 Pa. C. L. J. 415.

Affidavits, bill of exceptions, statement—sec. 659, subs. 1, 2, and notes.

Minutes of court—sec. 660.

Statement on appeal—*Contents required*, 8 Cal. 618; 10 Cal. 300; 11 Cal. 214, 339; 12 Cal. 280; 13 Cal. 50; 15 Cal. 359; 44 Cal. 326; 45 Cal. 112; 47 Cal. 427; 48 Cal. 35, 540; quantity of evidence, see 43 Cal. 619. *Time prescribed as to*, 8 Cal. 322; 12 Cal. 412, and see PROCEEDINGS, LIMITED TIME FOR, sec. 659n. *Judge's certificate*, 47 Cal. 526. *Specifying particulars*, sec. 659n. *Appeal from order as to new trial*, sec. 936, subd. 3 and notes. *Record on appeal*, 49 Cal. 146.

§ 662. The verdict of a jury may also be vacated, and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice. The order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a statement to be used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in sec. 661. [In effect July 1st, 1874.]

§ 663. Repealed. [In effect April 15th, 1880.]

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

- § 664. Judgment to be entered in twenty-four hours, etc.
- § 665. Case may be brought before the court for argument.
- § 666. When counter-claim established exceeds plaintiff's demand.
- § 667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment.
- § 668. Judgment book to be kept by the clerk.
- § 669. If a party die after verdict, judgment may be entered, but not to be a lien.
- § 670. Judgment roll, what to constitute.
- § 671. Judgment lien, when it begins and when it expires.
- § 672. Docket, how kept, and what to contain.
- § 673. Docket to be open for inspection without charge.
- § 674. Transcript to be filed in any county, and judgment to become a lien there.
- § 675. Satisfaction of a judgment, how made.

§ 664. When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

Entering judgment—13 Cal. 50; 28 Cal. 335; 44 Cal. 132.

Reserving—for argument or further consideration, sec. 665.

Stay of proceedings—by appeal, sec. 949 and note.

JUDGMENT GENERALLY.

Abatement of—when made, 36 Cal. 132. Abbreviations—etc., sec. 123. Affirmative relief—where sought, see DEFENDANT, FOR. Affirming—sec. 53n. Amendment—sec. 473n. Appeal from—sec. 939, subds. 1 and 2, notes. Appellate supervision over—sec. 53, and notes. Assignment of—12 Cal. 257; 22 Cal. 430; 23 Cal. 255, 596; 25 Cal. 189, 538. Attack on—direct and collateral, sec. 412n; sec. 1908n. Authentication—47 Cal. 21. Compromise—after offer of, sec. 997. Confession, by—sec. 1132. Counter-claim, where—see DEFENDANT, FOR. Currency, in—sec. 667. Default, by—sec. 585 and note. Defendant, for—for excess of counter-claim, or affirmative relief, sec. 666. Defined—sec. 577. Demurrer, on—sec. 636. Dismissal, of—sec. 581. Enforcing—sec. 684; and see sec. 957. Entry of—see ENTERING JUDGMENT, note, *supra*: on demurrer, 49 Cal. 346. Estoppel on—sec. 1908. Excess, remitting—see REDUCTION, enforcing. Final—sec. 939n; 1 Cal. 24, 134, 5 Cal. 428; 14 Cal. 248; 15 Cal. 145, 162; 16 Cal. 381; and as to contempt, see sec. 1222. Form, question as to—*Preston v. Hearst*, March 16th, 1880, 5 Pac. C. L. J. 123. Gold Coin, in—sec. 667. Intendments as to—see INTEND-
CODE CIV. PROC.—21.

§§ 665-6 GIVING AND ENTERING JUDGMENT.

MENTS, sec. 53*n*. Interest—28 Cal. 288; 30 Cal. 91; 33 Cal. 82. Intoluntary—sec. 647*n*. Intervention, after—see INTERVENTION, generally, sec. 387 and note. Kinds of—sec. 577*n*. Language of—sec. Mistakes in—see AMENDMENTS, and 45 Cal. 653. Modifying—53*n*; sec. 957; 53 Cal. 653. Money—in specified kind of, sec. 667 note; of account, Political Code, 3272-3274. New Trial—vacating, sec. 657; 28 Cal. 534. Non obstante veredicto—18 Cal. 669. Nonsuit, sec. 581. Obedience to—enforcing, see CONTEMPTS, sec. 1209, sub 5, 12, and notes; sec. 1210; and generally, secs. 1209-1222. Order for—FORM. Parties to—secs. 385, 578, 579, 669; 15 Cal. 41; 37 Cal. 346; 39 Cal. 412, 688; 40 Cal. 639. Pendency of action—sec. 1049. Pleading, sec. Pleadings on—sec. 585*n*. Recitals in—50 Cal. 454; effect of recit generally, sec. 1962, subd. 2 and note. Reduction, enforcing—12 Cal. 479; 14 Cal. 419. Relief by—sec. 580*n*. Remittitur—sec. 958. Reserving—sec. 655. Restitution—on reversal or modification of, sec. 9 Reversing—sec. 53*n*, sec. 957. Review of—on new trial, sec. 656 *et seq* on appeal, sec. 53*n*; sec. 936 *et seq*., and see sec. 956. Setting off—368, 7 Cal. 543; 8 Cal. 398; 11 Cal. 93; 14 Cal. 223; 20 Cal. 277; 22 Cal. 41 Jones v. Chalfant, March 15th, 1880, 5 Pac. O. L. J. 134. Uncertain when, 53 Cal. 13. Vacating—see NEW TRIAL, *supra*, and OPENING Default—sec. 473*n*; also AMENDMENT, *supra*. Validating—50 Cal. 3

JUDGMENT IN PARTICULAR CASES.

Administration—against, sec. 1504. Arrest of debtor—directly see sec. 684. Attached property—satisfying from, sec. 550; 9 Cal. 5 Award on—sec. 1286. Contempt, in—sec. 1222. Deed, setting aside generally, 21 Cal. 629; 41 Cal. 85; of decedent, sec. 1589; 39 Cal. 6 Ejectment, in—9 Cal. 213; 14 Cal. 465; 18 Cal. 108, 217; 22 Cal. 513, 64 26 Cal. 272; 32 Cal. 176; 35 Cal. 316; 36 Cal. 625; 40 Cal. 294, 299; 41 Cal. 4 44 Cal. 177; 49 Cal. 137, 202; 50 Cal. 314. Executor, against—see ADMINISTRATOR. Fiduciary funds—as to, sec. 667*n*. Foreclosure—sec. 72 Infant, against—31 Cal. 273. Joint debtors, against—sec. 989. Married woman—as to, see under PARTIES, secs. 370, 371. Mechanic liens—secs. 1193, 2194. Partition—sec. 706. Partnership—winding up 33 Cal. 641. Receiver—executing or securing, sec. 564, subds. 3, 4, and notes. Reference, on—sec. 644. Replevin, in—sec. 667, and note Sureties—on official bond, against, 25 Cal. 521; 29 Cal. 642; on appeal bond, subrogation of, sec. 1059. Trespass, in—53 Cal. 653. Trust, establishing—form of, 25 Cal. 317; 34 Cal. 514.

§ 665. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

Argument—see sec. 53*n*.

§ 666. If a counter-claim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Counter-claim—generally, secs. 438, 439; dismissal or nonsuit, where none, sec. 581, subd. 1. Exceeding plaintiff's demand, see under Verdict, sec. 626. Affirmative relief—see sec. 442.

n action to recover the possession of per- judgment for the plaintiff may be for the be value thereof, in case a delivery cannot damages for the detention. If the property vered to the plaintiff, and the defendant thereof, judgment for the defendant may of the property or the value thereof, in case t be had, and damages for taking and with- ne. In an action on a contract or obliga- g, for the direct payment of money, made pecified kind of money or currency, judg- plaintiff, whether it be by default or after ollow the contract or obligation, and be in the kind of money or currency specified n all actions for the recovery of money, if lege in his complaint that the same was un- agreed by the respective parties to be pay- ified kind of money or currency, and this d by the default of the defendant or estab- ence, the judgment for the plaintiff must be in the kind of money or currency so al- mplaint; and in an action against any per- overey of money received by such person in apacity, or to the use of another, judgment ff must be made payable in the kind of ency so received by such person.

ment—form of, 7 Cal. 563; 38 Cal. 508; 45 Cal. 76, 230: l. 230; for defendant, directing return of property, . 430; 20 Cal. 616; 29 Cal. 312; verdict, sec. 627; value, it of, sec. 473; damages for detention or withholding, 41; 49 Cal. 313; 53 Cal. 97; Kelly v. McKibben, Feb. C. L. J. 38 and 83. Money or currency, specified n construed. 25 Cal. 564; 26 Cal. 46, 581; 27 Cal. 346; 32 g contract. 27 Cal. 498; 29 Cal. 278; 33 Cal. 468, 624; 33 7; 49 Cal. 293; gold coin, 25 Cal. 564; 27 Cal. 478; 28 l. 278; 31 Cal. 78; 38 Cal. 242, and see JUDGMENT: nder, 25 Cal. 502; 28 Cal. 276, 288; 29 Cal. 273; 30 Cal. Allegations of complaint, 27 Cal. 99, 495, 498; 28 Cal. 6 Cal. 209; 50 Cal. 524. Default, 28 Cal. 213. Evidence, 48 Cal. 634. Judgment, gold coin, 28 Cal. 170; 35 Cal. Cal. 90, 280, 523; 51 Cal. 75, 210, 554; 52 Cal. 90, 238, ec. 682, subd. 4.

fiduciary capacity, sec. 1407; 26 Cal. 421; 33 Cal. 557, er, 28 Cal. 268; 33 Cal. 399, 650.

clerk must keep, with the records of the o be called the "judgment book," in which st be entered.

ions—sec. 1052.

party die after a verdict or decision upon act, and before judgment, the court may

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§§ 670-1. GIVING AND ENTERING JUDGMENT.

nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party but is payable in the course of administration on the estate.

Death—suggestion and effect of, sec. 385 and notes.

Death after verdict—50 Cal. 40.

Payable in course of administration—sec 1506, and see sec. 1504.

Before judgment entered—50 Cal. 239.

§ 670. Immediately after entering the judgment the clerk must attach together and file the following papers which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment;

2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, a bills of exceptions taken and filed, and a copy of an order made on demurrer, or relating to a change of parties and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision. [In effect March 9th, 1876.]

Clerk's powers and duties—county clerk, see POLITICAL CODE, secs. 4204, 4205; deputies, see POLITICAL CODE, secs. 865, 4112-4114; functions generally, see MINISTERIAL OFFICERS, sec. 262*n*; also, see 585, subds. 1 and 2, 593, 664, 668, 671-3, 1051, 1052, 2012.

Judgment roll—contents, etc. 18 Cal. 219; 27 Cal. 107; 28 Cal. 170, 295; 31 Cal. 238; 32 Cal. 172; 34 Cal. 391, 611; 36 Cal. 112; 40 Cal. 378; 47 Cal. 640; 49 Cal. 308; 53 Cal. 39, 399; and see notes following.

SUBDIVISION 1. Where no answer—*Summons*, contents and proof of service, secs. 407, 415, and notes; complaint, sec. 426 and notes. *Both part of judgment roll*, *Mand v. Wear*, May 17th, 1880, 5 Pac. C. L. J. 426. *Judgment, by default*, sec. 585 and notes.

SUBDIVISION 2. Other cases—*Pleadings*, see secs. 420-476. *Verdict*, secs. 624-628. *Findings*, sec. 633*n*. *Report of referee*, Thompson & Patterson, April 23rd, 1880, 5 Pac. C. L. J. 388. *Exceptions*, sec. 648*n*, secs. 646-653. *Order on demurrer*—sec. 656 and note. *Change of parties*, sec. 473 and note; 49 Cal. 306. *Copy of judgment*, *Thomas v. Anderson*, May 26th, 1880, 5 Pac. C. L. J. 415. *Judgment*, generally, sec. 577*n*; secs. 577-582; sec. 654*n*; review of, papers on, 53 Cal. 281, 393; by default, see subd. 1 and note.

§ 671. Immediately after filing the judgment roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien

INDEXING AND ENTERING JUDGMENT. §§ 672-4

real property of the judgment debtor not executed in the county, owned by him at the time he may afterward acquire, until the lien continues for two years, unless the execution of the judgment be stayed on appeal by the debtor's sufficient undertaking, as provided in this section. In a case the lien of the judgment ceases. [In *Wright v. Wright*, 1874.]

Execution—error in, 6 Cal. 277; time of, 39 Cal. 137.

Index—secs. 672-674.

—To what attaches, 14 Cal. 428; 16 Cal. 181, 213; 23 Cal. 121. **Effect on attachment lien—**37 Cal. 121. **Two years' duration—**16 Cal. 403; 17 Cal. 471; 31 Cal. 395; 46 Cal. 654. **Appellate court—**941 *et seq.*; 6 Cal. 130; 25 Cal. 337. **Extinguished, how, and by—**16 Cal. 404; 25 Cal. 337; 28 Cal. 520.

The docket mentioned in the last section is a book which the clerk keeps in his office, with each page divided into eight columns, and headed as follows: judgment; judgment creditors; judgment; time of judgment entered in judgment book; appeals, when entered in judgment book; satisfaction of judgment entered in judgment book; satisfaction of judgment entered. If judgment be for the recovery of real property, the amount must be stated in the margin of the head of judgment; if the judgment be for money, a memorandum of the general character of the relief granted must be stated. The names of the parties must be entered in alphabetical order.

Indexing—sec. 671 and note; 31 Cal. 293.

Index—what constitutes, 38 Cal. 393; sufficient entry, 50

The docket kept by the clerk is open at all times, and is to be kept open for the inspection of the public, without charge. The clerk must arrange the several dockets in such a manner as to facilitate their inspection.

Index—open to inspection, secs. 1892, 1893.

A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county before the time of the filing of the judgment be- fore the judgment is executed, in such county, owned by the debtor at the time, or which he may afterward, and before the judgment expires, acquire. The lien continues for two years from the time the judgment be previously satisfied.

Indexing—filing transcript in, Civil Code, sec. 1150; where filed, 400, *ante*; but see sec. 78.

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Recording generally—secs. 1165, 1169, 1170.

Continuance of lien—23 Cal. 40.

Justice's Court judgment—abstract creates lien, sec. 900; and see Cal. 223.

§ 675. Satisfaction of a judgment may be entered the clerk's docket upon an execution returned satisfied or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of conveyance of real property, by the judgment creditor or by his indorsement on the face, or on the margin of the record of the judgment, or by the attorney, unless revocation of his authority is filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it. [In effect July 1st, 1874.]

Satisfaction of judgment—*What constitutes*, 8 Cal. 29; 14 Cal. 661; Cal. 173; 23 Cal. 94; 44 Cal. 519; *apparent only*, 14 Cal. 661; 25 Cal. 538; 32 Cal. 131; 34 Cal. 666; 52 Cal. 345. *Entry of*, improperly stricken out, 3 Cal. 342; acknowledgment, sec. 179, subd. 2. *Parties empowered to give*, creditor, 2 Cal. 507; 35 Cal. 195; 46 Cal. 70; 49 Cal. 359; attorney, 48 Cal. 48 and see secs. 283-285.

TITLE IX.

**Execution of the Judgment in
Civil Actions.**

The execution.
Proceedings supplemental to the execution.

[247]

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CHAPTER I.
THE EXECUTION.

- 681. Within what time execution may issue.
- 682. Who may issue the execution, its form, to whom directed, and what it shall require.
- 683. When made returnable.
- 684. Money judgments, and others, how enforced.
- 685. Execution after five years.
- 686. When execution may issue against the property of a party after his death.
- 687. Execution, how and to whom issued.
- 688. What shall be liable to be seized in execution. Not to be affected till a levy is made.
- 689. When property is claimed by a third party, how the right of property is tried.
- 690. What exempt from execution.
- 691. Writ, how executed.
- 692. Notice of sale under execution, how given.
- 693. Selling without notice, what penalty attached.
- 694. Sales, how conducted. Neither the officer conducting it nor his deputy to be a purchaser. Real and personal property, how sold. Judgment debtor, if present, may direct order of sale and the officer shall follow his directions.
- 695. If purchaser refuses to pay purchase-money, what proceedings.
- 696. Court of justice may proceed in a summary manner against purchaser refusing to pay. Officer may refuse such purchaser's bid after.
- 697. These two sections not to make officer liable beyond a certain amount.
- 698. Personal property not capable of manual delivery, how delivered to purchaser.
- 699. Personal property not capable of manual delivery, how sold and delivered.
- 700. Real property, when absolute sale or not. In the latter case what the certificate must contain.
- 701. Real property so sold, by whom it may be redeemed.
- 702. When it may be redeemed, and redemption money.
- 703. When judgment debtor or other redemptioner may redeem.
- 704. In cases of redemption, to whom the judgments are to be made.
- 705. What a redemptioner must do in order to redeem.
- 706. Until the expiration of redemption time court may restrain waste on the property. What considered waste.
- 707. Rents and profits.
- 708. If purchaser of real property be evicted for irregularities in sales, what he may recover and from whom. When judgment to be revived. Petition for the purpose, how and by whom made.
- 709. Party who pays more than his share may compel contribution.

§ 681. The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

Entry of judgment—Time for execution begins to run from, 28 Cal. 418; 30 Cal. 621; 34 Cal. 611: generally, sec. 664, and note.

Within five years—22 Cal. 647: when extended, sec. 685: changes in statute, 37 Cal. 11.

Stay of execution—When proper, 31 Cal. 170: when improper, *Livermore v. Hodgkins*, April 26th, 1880, 5 Pac. C. L. J. 348: by appeal, secs. 942, 942-945: no extension of period for issuance by, 29 Cal. 227: perpetual, when not granted, 41 Cal. 253: new trial as, 23 Cal. 68; and see 40 Cal. 278.

§ 682. The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees, it must require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.

4. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, it must also require the sheriff to satisfy the same in the kind of money or currency in which the judgment is made payable, and the sheriff must refuse payment in any other kind of money or currency; and in case of levy and sale of the property

of the judgment debtor, he must refuse payment for any purchaser at such sale in any other kind of money or currency than that specified in the execution. The sheriff, collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

5. If it be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, rents, or profits, not covered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Writ—generally, see sec. 51*n*.

Style of process, title of court—compare sec. 407*n*.

Issuance—improper, 14 Cal. 138; clerk refusing, 10 Cal. 489; without docketing of judgment, proper, 39 Cal. 137.

Name of the people—50 Cal. 511.

Judgment—Following strictly, 10 Cal. 411.

SUBDIVISION 1. Satisfy the judgment—see 44 Cal. 520. Personal property insufficient—6 Cal. 47. Lien of docketed judgment—see sec. 571; effect of execution on, 37 Cal. 121. Transcript of the docket filed—see sec. 674.

SUBDIVISION 3. Execution against the person—see sec. 684*n*.

SUBDIVISION 4. Money or currency specified—kind of, sec. 667*n*.

SUBDIVISION 5. Personal property, delivery of possession of—see REPLEVIN, judgment in, sec. 667*n*. Real property—writs of possession, restitution, assistance, see sec. 684*n*.

§ 683. The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution book," which book must be indexed with the names of the plaintiffs and defendants in execution, alpha

betically arranged, and kept open at all times during office hours for the inspection of the public without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated.

Sheriff's return—5 Cal. 53, 470; 6 Cal. 85, 277; 8 Cal. 165; 12 Cal. 128; 31 Cal. 220; 38 Cal. 428.

§ 684. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith. When the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court. [In effect July 1st, 1874.]

Possession of real property—*Writ of possession or restitution*—secs.

130, 1174; 6 Cal. 148; 10 Cal. 211; 19 Cal. 374; 22 Cal. 142; 25 Cal. 515; 29 Cal. 60; 30 Cal. 229; 31 Cal. 333; 34 Cal. 483; 36 Cal. 455; 44 Cal. 177; 46 Cal. 279; 30 Cal. 160, 289. *Writ of assistance*—11 Cal. 190; 16 Cal. 156; 17 Cal. 87; 18 Cal. 141; 21 Cal. 87, 103, 107; 22 Cal. 373; 23 Cal. 48; 24 Cal. 561; 27 Cal. 295; 31 Cal. 220; 34 Cal. 11; 38 Cal. 234; 43 Cal. 356; 45 Cal. 97, 316, 617; 53 Cal. 357; Langley v. Voll, April 26th, 1880, 5 Pac. C. L. J. 444. *Dispossessed*—parties, privies, etc., may be, 10 Cal. 211; 21 Cal. 103; 22 Cal. 142, 200; 25 Cal. 515; 26 Cal. 125; 29 Cal. 131, 665; 30 Cal. 229, 419; 31 Cal. 333; 36 Cal. 147; 37 Cal. 348; 41 Cal. 501; McCreery v. Everding, No. 6,119, Feb. 14th, 1880, 5 Pac. C. L. J. 8; and see preceding notes.

Execution against the person—10 Cal. 411; 36 Cal. 159; discharge of prisoner, secs. 1143-1154.

Sale of property—see sec. 694 *et seq.*

Performance of any other act—Enforcing obedience, sec. 1209, *et seq.*

EXECUTION.

Amending—38 Cal. 372; 53 Cal. 557. Assistance, writ of—sec. 684n. Attachment—where property under, secs. 550, 551, 636n. Bids—at sale, secs. 696-697. Book—recorded in, sec. 683. Certificate—of sale, secs. 686-700, and notes: of redemption, sec. 703. Claim—to property seized, sec. 689, and notes. Contents of—see FORM OF CONTRIBUTION—sec. 709. County—to which issued, sec. 687. Costs, for—secs. 1032, 1034, 1720; 1 Cal. 212; 14 Cal. 232. Death—of party, after, sec. 686, and note. Directed—how, sec. 682. Dispossessed—who may be, sec. 684n. Effecting—sec. 691, and notes; also see LEVY, SALE, etc. En masse—

sale of realty, see **GROSS, IN.** Enforcement of judgment by—sec. 684. Enjoining—16 Cal. 200; and see **INJUNCTION**, secs. 525-533. Eviction—sec. 708. Exemptions—sec. 690, and notes. Foreclosure—sec. 726; 3 Cal. 621; and see **ASSISTANCE, WRIT OF.** Form—sec. 682, and notes. **Gross, in**—sale of realty, sec. 694*n.* Impeaching sale—sec. 694*n.* Indemnity—sec. 689, and note. Irregularity in sale—see **IMPEACHING** also sec. 708, and note. Issuance—manner of, secs. 682, 687; after death of party, sec. 686. Time for—see that head. Judgment—following, sec. 682, and note; enforcing, sec. 684. Leasehold—absolute sale of, sec. 700. Levy—sec. 688, and note, sec. 691*n.* Leviaible interest—sec. 691*n.* Mandamus—in, sec. 1095. Manual delivery—property capable of, secs. 694, 698; property not capable of, sec. 688. Mortgage—sec. 701, subd. 2, note; and see **FORECLOSURE.** Notice of sale—secs. 692, 693, and notes. Order for payment—of money by court, on, sec. 1007. Person, against the—sec. 684*n.* Personal property—see **PROPERTY**. Possession—obtaining, see under **PROPERTY, Personal and Real** writ of, sec. 684*n.* Property—liable to, sec. 688, and note. *Exempt* see **EXEMPTIONS.** *Personal levy*, see that head: sale of, sec. 694, and see **THINGS IN ACTION**: obtaining possession of, sec. 682, subd. 5, note; purchase, secs. 698, 699. *Real*, sale, sec. 694; purchase, sec. 700; levy see that head: possession, obtaining, sec. 682, subd. 5, sec. 684*n.* Purchaser—refusing to pay, secs. 695-697; rights of, secs. 698-708. Quashing—30 Cal. 114; 31 Cal. 170; 47 Cal. 626; 49 Cal. 266. Real property—see under **PROPERTY.** Recalling—31 Cal. 170. Receiver—in aid of, sec. 564, subd. 4. Redemption—secs. 701-705: certificate of, see **CERTIFICATE**: method of, secs. 702, 703, 705: money for, sec. 702*n.*; also, secs. 702, 704: parties who may effect, sec. 701*n.*; papers for, sec. 703, and notes: time for, sec. 702*n.*, sec. 703. Redemptioner—sec. 701, subd. 2. Rents and Profits—sec. 707, and note. Requirements in—sec. 682, and notes. Restitution, writ of—sec. 684*n.* Return of—sec. 683, and note. Reviving—sec. 685*n.* Sales—conducted how, sec. 694, and notes; see, also, **BIDS, CERTIFICATE, IMPEACHING, IRREGULARITY, NOTICE, PURCHASER, REDEMPTION, SHERIFF'S DEED**, etc. Satisfied judgment on—25 Cal. 538; 49 Cal. 359; and see **QUASHING.** Setting aside—8 Cal. 130. Setting off—42 Cal. 110. Sheriff's deed—sec. 703*n.* Sheriff's duties—as to, sec. 682, 691, and notes. Sheriff's jury—sec. 689*n.* Stay of—sec. 681*n.* Subrogation—sec. 709*n.* Supplementary proceedings—secs. 714-721: application for, secs. 714, 715: character of, sec. 714*n.*: contempt, sec. 721: examination, secs. 717, 718: garnishee, answer of, sec. 717: order for, sec. 714, 715: result of, secs. 719, 720. Suspending—31 Cal. 170. Things in action—disposition of, sec. 691*n.* Time for—secs. 681, 685, and notes. Title acquired—by certificate of sale, sec. 700*n.*: by sheriff's deed, sec. 703*n.* Vacating—41 Cal. 626, and see **SETTING ASIDE.** Venditioni exponas—writ of, 8 Cal. 165; 48 Cal. 133. Vessels, against—sec. 824. Void—and voidable, 33 Cal. 372. Waste—sec. 706, and note. Writ of—how carried into effect, sec. 691 *et seq.* Writs—of assistance, restitution, etc., see those heads.

§ 685. In all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings.

Reviving execution—8 Cal. 512; 37 Cal. 11: formerly applicable.

unsatisfied, 29 Cal. 227; *scire facias*, former method, 21 sec. 802.

Cal. 270; 47 Cal. 626.

pleadings—generally, sec. 464 and notes.

withstanding the death of a party after the execution thereon may be issued, or it may be follows:

of the death of the judgment creditor, upon on of his executor, or administrator, or suc- rest;

of the death of the judgment debtor, if the or the recovery of real or personal property, ment of a lien thereon.

r—effect on action, sec. 385 and notes; judgment after, on after, sec. 1505; 50 Cal. 289.

1. See note, *supra*.

2. Real or personal property, recovery of—see sec. attachment cases—not included, 50 Cal. 365.

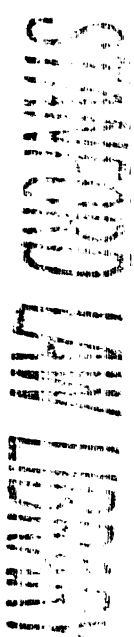
ere the execution is against the property of debtor, it may be issued to the sheriff of the State. Where it requires the delivery rsonal property, it must be issued to the county where the property, or some part uated. Executions may be issued, at the different counties.

n the State, process extends to, sec. 78.

goods, chattels, moneys, and other property, l personal, or any interest therein of the ator, not exempt by law, and all property roperty seized and held under attachment are liable to execution. Shares and inter- poration or company, and debts and credits, roperty, both real and personal, or any er real or personal property, and all other apable of manual delivery, may be attached in like manner as upon writs of attach- ust must be returned by the officer as so collected, at its current value, without ex- me to sale. Until a levy, property is not e execution.

o execution—*Chattels*, portable property, custody ched property, see sec. 550. *Interest*, trust, 52 Cal. 326; Cal. 378; 12 Cal. 191; 43 Cal. 238; 52 Cal. 617; pledgor's, ent debtor's, 1 Cal. 123; 3 Cal. 454; 12 Cal. 226; 19 Cal. ood will, Civil Code, secs. 992, 993. *Contracts*, contin- ated, 13 Cal. 15; judgment, 7 Cal. 187; franchise, Civil ; but *contra* before Code, 5 Cal. 471; 7 Cal. 286; 24 Cal.

PROC.—§§.



474. *Homestead*, when, see Civil Code, secs. 1241-1261; 17 Cal. 403; 41 Cal. 435; separate property of wife, not liable, 10 Cal. 9; 24 Cal. 98; and sole trader's, see secs. 1811-1822.

Levy—lien of execution dates from, 6 Cal. 195; 38 Cal. 649; 42 Cal. 400; and see 14 Cal. 47; generally, see sec. 691*n*.

§ 689. If the property levied on be claimed by a third person as his property, the sheriff may summon from the county six persons qualified as jurors, between the parties, to try the validity of the claim. He must also give notice of the claim and of the time of trial to the plaintiff who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff, and the witnesses must be paid by the claimant, if the verdict be against him; otherwise, by the plaintiff. Each party must deposit with the sheriff, before the trial, the amount of his fees and the fees of the jury, and the sheriff must pay the same to the prevailing party.

Claimed by third person—notice and demand, 1 Cal. 160; 6 Cal. 512; 10 Cal. 172; 12 Cal. 73; 23 Cal. 359; 26 Cal. 514; 30 Cal. 190; 33 Cal. 41 Cal. 469.

Sheriff's jury—verdict no protection to officer, 10 Cal. 189; 28 Cal. 400.

Sufficient indemnity—8 Cal. 227; 15 Cal. 75; 18 Cal. 622; 32 Cal. 23; 33 Cal. 455; where several executions, 8 Cal. 227; 13 Cal. 521; 34 Cal. 600; summary remedy against sureties on bond, sec. 1055, and notes.

§ 690. The following property is exempt from execution, except as herein otherwise specially provided:

1. Chairs, tables, desks, and books, to the value of two hundred dollars, belonging to the judgment debtor;

2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, including one sewing machine, stoves, stove pipes, and furniture, wearing apparel, beds, bedding, and bedsteads, hanging pictures, oil paintings, and drawings drawn or painted by any member of the family, and family portraits and their necessary frames, provisions actually provided for individual or family use sufficient for three months, and three cows and their sucking calves, four hogs with their sucking pigs, and food for such cows and hogs for one month;

3. The farming utensils or implements of husbandry of the judgment debtor; also, two oxen, or two horses, or two mules and their harness, one cart or wagon, and food for such oxen, horses, or mules for one month; also, all seed, grain or vegetables actually provided, reserved, or

on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars, and seventy-five bee-hives, and one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business;

4. The tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal, records, and office furniture of a notary public; the instruments and chest of a surgeon, physician, surveyor, or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school teachers, and music teachers, and their necessary office furniture; also, the musical instruments of music teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps, and office furniture of a searcher of records, necessary to be used in his profession;

5. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any mining operations, not exceeding in value the aggregate sum of five hundred dollars, and two horses, mules, or oxen, with their harness, and food for such horses, mules, or oxen for one month, when necessary to be used in any whim, windlass, derrick, car, pump, or hoisting gear, and also his mining claim actually worked by him, not exceeding in value the sum of one thousand dollars;

6. Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupé, one hack or carriage for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living, and one horse with vehicle and harness, or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business, with food for such oxen, horses, or mules for one month;

7. Poultry not exceeding in value twenty-five dollars;

8. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this State, supported in whole or in part by his labor;

but where debts are incurred by any such person, or wife or family, for the common necessities of life, one-half of such earnings above mentioned are, nevertheless, subject to execution, garnishment, or attachment satisfy debts so incurred;

9. The shares held by a member of a homestead association duly incorporated, not exceeding in value one thousand dollars, if the person holding the shares is the owner of a homestead under the laws of this State. All the nautical instruments and wearing apparel of a master, officer, or seaman of any steamer or other vessel;

10. All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance on the life of the debtor, if the annual premium paid do not exceed five hundred dollars;

11. All fire engines, hooks and ladders, with the carts, trucks, and carriages, hose, buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this State;

12. All arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun to be selected by the debtor;

13. All court-houses, jails, public offices, and building lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the jail and public offices belonging to any county or to any city and county of this State, and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this State.

No article, however, or species of property mentioned in this section, is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage thereon. [Approved April 18 1878.]

Object of exemptions—38 Cal. 385.

Seizure of exempt property—liability for, 39 Cal. 700; county revenues, 8 Cal. 52; and see 10 Cal. 404.

Leviable property—sec. 638*n*: ferryboat, 23 Cal. 257; mining claim, Cal. 137; 12 Cal. 56; 22 Cal. 645.

EXEMPTIONS.

- ON 1. Chairs, tables, etc.—38 Cal. 384.
 ON 2. Necessary furniture—15 Cal. 266; 38 Cal. 384.
 ON 3. Horses on farm—38 Cal. 383.
 ON 4. Tools of workman—38 Cal. 384.
 ON 5. Mining apparatus, 38 Cal. 384.
 ON 6. Vehicle in use, etc.—two horses, 22 Cal. 504; 23 Cal. 238; two mules, 10 Cal. 393; harness, 43 Cal. 238; wagon, Cal. 238; teamster, 34 Cal. 302; other laborer, 34 Cal. 302; his living, 34 Cal. 302; *Forsyth v. Bower*, 5 Pac. C. L. J.
 ON 9. Homestead right—what, 37 Cal. 96.
 ON 10. Insurance policy—36 Cal. 542 (before Amdt. 1878);

the sheriff must execute the writ against the judgment debtor, by levying on a sufficient of property, if there be sufficient, collecting the things in action, and selling the other property to the plaintiff or his attorney so much proceeds as will satisfy the judgment. Any proceeds over the judgment and accruing are to be returned to the judgment debtor, unless directed by the judgment or order of the court. If there is more property of the judgment debtor sufficient to satisfy the judgment and accruing in the view of the sheriff, he must levy only on so much of the property as the judgment debtor may have. The property indicated be amply sufficient to satisfy the judgment and costs. [In effect July 1st, 1874.]

to execute writ—Political Code, sec. 4180; 1 Cal. 104; 49 Cal. 664; 49 Cal. 351; 50 Cal. 476. *Apparent* 6 Cal. 43; 12 Cal. 73, 226. *Writ fully executed*, 1 Cal. 25. *of execution dates from*, see sec. 638n. *As satisfaction*, 6 Cal. 131. *Mode of*, 7 Cal. 549; 12 Cal. 469; 25 Cal. 555; 49 Cal. 14 Cal. 47; sec. 542, and notes. *Attaches to what*, see sec. 638n. *On lands*, 37 Cal. 122;

interest—sec. 638n; 41 Cal. 325; 42 Cal. 646.

action—see *Interest, Contracts*, under PROPERTY LIABLE TO EXECUTION, sec. 638n; 18 Cal. 436; 34 Cal. 81; collecting, secs. 544, 545; partner's interest, *Jones v. Thompson*, 12 Cal. 191; 52 Cal. 119; generally, see 13 Cal. 626; 43 Cal. 119.

property—sec. 654 *et seq.*

proceeds—Political Code, sec. 4181; 6 Cal. 195; 10 Cal. 195; surplus, 40 Cal. 408; labor claims, sec. 1206.

debtor—indicating property to be levied on, 6 Cal. 47.

before the sale of property on execution, notice must be given, as follows:

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1. In case of perishable property: by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place for such time as may be reasonable, considering the character and condition of the property;

2. In case of other personal property: by posting similar notice in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days;

3. In case of real property: by posting a similar notice particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper published in the county if there be one;

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment. [In effect July 1st, 1879.]

Sale of vessels, notice of—secs. 824, 827.

Sale without notice—see sec. 693.

SUBDIVISION 1. Perishable property—sale under attachment, see 547.

SUBDIVISION 4. Specified kind of money—see sec. 682; subd. and notes.

§ 693. An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

Want of notice—remedy for, 6 Cal. 47; 17 Cal. 626; aggrieved party 22 Cal. 263.

§ 694. All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price.

and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or, when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

Statute, directory—38 Cal. 654.

Publicity of sale—12 Cal. 192.

Auctioneer—sheriff as, Political Code, sec. 3291.

Sheriff de facto—sale by, 17 Cal. 626.

Purchaser—for others, 30 Cal. 586; judgment creditor as, 34 Cal. 293; pledgee as, 36 Cal. 414; part owner may be, 7 Cal. 588; 19 Cal. 120; 43 Cal. 119; of judgment, 18 Cal. 436; lien of, 9 Cal. 117; rights of, 1 Cal. 24; 9 Cal. 366; bona fide, 38 Cal. 372.

Real property—Sale in gross, 6 Cal. 47; 11 Cal. 14; 21 Cal. 56; 51 Cal. 53; *Vigourex v. Murphy*, March 19th, 1880, 5 Pac. C. L. J. 176.

Impeaching sale—irregularity, for, 7 Cal. 160; 18 Cal. 436; 23 Cal. 226. *Vigourex v. Murphy*, cited *supra*: void judgment, under, 8 Cal. 562; 38 Cal. 428; sheriff's return, not basis for, 5 Cal. 53; 6 Cal. 277; 38 Cal. 649; for fraud, 23 Cal. 359.

§ 695. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. [In effect July 1st, 1874.]

Purchase money not paid—where balance, 5 Cal. 66; refusal, 6 Cal. 91; 8 Cal. 21; failure prevents recovery against sheriff, 22 Cal. 263.

Recovery from bidder—9 Cal. 93; 22 Cal. 511.

Relief from purchase—16 Cal. 559.

§ 696. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such person. [In effect July 1st, 1874.]

§ 697. The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

§ 698. When the purchaser of any personal property, capable of manual delivery, pays the purchase-money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him

a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Certificate of sale—see next section.

§ 699. When the purchaser of any personal property not capable of manual delivery, pays the purchase-money to the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Certificate of sale—tender unnecessary, 5 Cal. 66; 9 Cal. 93.

§ 700. Upon a sale of real property, the purchaser substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale containing—

1. A particular description of the real property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. When subject to redemption, it must be so stated.

And when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county.

Purchaser at sale—for plaintiff, 44 Cal. 520; lien of, 9 Cal. 117.

Title acquired by sale—through certificate, 4 Cal. 196; 5 Cal. 392; Cal. 529; 26 Cal. 655; 30 Cal. 135; 31 Cal. 301, 591; 36 Cal. 390; 38 Cal. 428, 428; generally, 9 Cal. 117, 365; 12 Cal. 123; 14 Cal. 667; 17 Cal. 45; 18 Cal. 220; 33 Cal. 426, 428; 41 Cal. 325.

Absolute sale of leasehold—31 Cal. 299.

Subject to redemption—2 Cal. 595; 6 Cal. 173; 9 Cal. 365; 11 Cal. 307; 15 Cal. 516; 21 Cal. 108; 22 Cal. 650; 23 Cal. 16; 33 Cal. 428; 40 Cal. 221.

Certificate—where sale on credit, 51 Cal. 3; assignment of, 30 Cal. 13.

Specified kind of money—sec. 632, subd. 4, and notes.

Duplicate of certificate filed—31 Cal. 293.

§ 701. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

ment debtor, or his successor in interest, in any part of the property; or having a lien by judgment or mortgage on sold, or on some share or part thereof, subject on which the property was sold. The period in the second subdivision of this section chapter, termed redemptioners.

mode of, sec. 702 *et seq.*: effect of, 13 Cal. 79.

1. Judgment debtor, etc. 51 Cal. 539.
2. Judgment creditor—redemption by, sec. 1505; 2
3. *Mortgage*, 9 Cal. 365; 15 Cal. 516; 53 Cal. 77.
- en—21 Cal. 108.
- nd to redeem—secs. 346, 347; 2 Cal. 387; 4 Cal. 127; 9
- 47; 14 Cal. 54; 15 Cal. 508; 16 Cal. 580; 21 Cal. 108; 23
- 3; 36 Cal. 390; 40 Cal. 221.

judgment debtor, or redemptioner, may re- property from the purchaser any time within after the sale, on paying the purchaser the s purchase, with two per cent. per month lition, up to the time of redemption, together ount of any assessment or taxes which the y have paid thereon after purchase, and in- h amount, and if the purchaser be also a ng a prior lien to that of the redemptioner, e judgment under which such purchase was ount of such lien, with interest. [Approved n, 1876.]

tor—sec. 701, subd. 1; 47 Cal. 82.

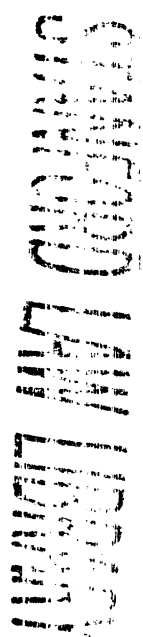
—sec. 701, subd. 2; 52 Cal. 644.

onths—21 Cal. 392: one year for redemption of fran- , sec. 392.

red for redemption—3 Cal. 295; 11 Cal. 14; 14 Cal. 559; l. 121; 23 Cal. 54; 47 Cal. 147: money, kind of, 4 Cal. 127; l. 189: payment under protest, 9 Cal. 366; 14 Cal. 232.

kes—13 Cal. 609; 47 Cal. 82.

property be so redeemed by a redemptioner, mptioner may, within sixty days after the on, again redeem it from the last redemp- ying the sum paid on such last redemption, r cent. thereon in addition, and the amount ment or taxes which the last redemptioner d thereon after the redemption by him, with ch amount, and in addition the amount of l by said last redemptioner prior to his own, t but the judgment under which the property l not be so paid as a lien. The property may as often as a redemptioner is so disposed,



redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with four per cent thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the sheriff, and a duplicate filed with the recorder of the county; and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff, and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of six months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale. [In effect July 1st, 1874.]

Sheriff's deed—*Contents of*, 48 Cal. 133; and see *Recitals in, Delivery of*, 51 Cal. 573. *Effect of*, as estoppel, 22 Cal. 224; 23 Cal. 399; 38 Cal. 658. *Executed by whom*, 3 Cal. 266; 6 Cal. 91; 8 Cal. 406; 9 Cal. 103; 12 Cal. 128, 297; 21 Cal. 373; 23 Cal. 403. *Executed, when to be*, 12 Cal. 128; 21 Cal. 392; 22 Cal. 373; 33 Cal. 668; 38 Cal. 428; 40 Cal. 611; 44 Cal. 334; 45 Cal. 594. *Mandamus for*, 6 Cal. 91; 17 Cal. 476; 21 Cal. 108. *Ratification of*, 51 Cal. 212. *Recitals in*, 24 Cal. 411; 25 Cal. 230; 30 Cal. 231; 38 Cal. 649; 40 Cal. 281; 47 Cal. 453; 49 Cal. 259; *Wilson v. Madison*, April 29th, 1880, 5 Pac. C. L. J. 340. *Title acquired by*, 8 Cal. 569; 9 Cal. 103, 117, 365, 426, 479; 17 Cal. 565, 608; 25 Cal. 236; 34 Cal. 257; 38 Cal. 375; 41 Cal. 552; 45 Cal. 617; 48 Cal. 572; reimbursement where none, 16 Cal. 562; 24 Cal. 608; and see sec. 708. *Writ of assistance*, sec. 684n.

Certificate of redemption—filed, 31 Cal. 301: recorded, see Political Code, sec. 4234: payment of taxes, 17 Cal. 476.

Sum paid on such last redemption—see AMOUNT REQUIRED FOR REDEMPTION, sec. 702a.

§ 704. The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

Specified kind of money—see sec. 682, subd. 4, and note; 26 Cal. 656, and compare 38 Cal. 242.

Tender equivalent to payment—17 Cal. 476; 37 Cal. 223; 53 Cal. 77.

§ 705. A redemptioner must produce to the officer or person, from whom he seeks to redeem, and serve with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed, or if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto.

3. An affidavit by himself or his agent, showing the amount then actually due on the lien.

Production of papers—by redemptioner, 14 Cal. 54; 37 Cal. 121; 49 Cal. 193.

SUBDIVISION 1. Certified copy docket of judgment—51 Cal. 539.

§ 706. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor, or for the repair of fences, or for fuel in his family, while he occupies the property.

Until expiration of time for redemption—no change of possession, 4 Cal. 96; 5 Cal. 391; 31 Cal. 293.

Waste—secs. 745, 746; 22 Cal. 191.

§ 707. The purchaser, from the time of the sale until redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. If when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended fifteen days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

Rents from tenant in possession—8 Cal. 592; 21 Cal. 135.

Use and occupation—action for, 5 Cal. 392; 7 Cal. 43; 13 Cal. 514; Cal. 113; 37 Cal. 424; 38 Cal. 425; 49 Cal. 165.

Mortgagor in possession—21 Cal. 233.

Rents and profits—liability for, 2 Cal. 387; 17 Cal. 596; 22 Cal. 150; 30 Cal. 425; 31 Cal. 269.

Payment of taxes—by party in possession, 13 Cal. 609.

§ 708. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession, in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original

and the judgment so revived has the same effect as would an original judgment of the date and no more.

on eviction—38 Cal. 377; and see reimbursement, TITLE ACQUIRED BY SHERIFF'S DEED, sec. 703n.

proceedings—*Erroneous judgment*, effect of re- 34 Cal. 293; 45 Cal. 628: relief from, 16 Cal. 559; 21 24 Cal. 585.

execution and sale—47 Cal. 602.

payment—53 Cal. 312.

property, liable to an execution against, is sold thereon, and more than a due judgment is satisfied out of the proceeds of property of one of them, or one of them at a sale, more than his proportion, he may sue for contribution from the others; and when a judgment is rendered against several, and is upon an obligation of one for the security of another, and the surety pays any part thereof, either by sale of his property or by payment, he may compel repayment from the obligor. In such case, the person so paying or contributing to the benefit of the judgment, to enforce the judgment or repayment, if, within ten days after his payment, he files with the clerk of the court where the judgment is rendered, notice of his payment and claim for contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin

7 Cal. 245.

primary liability, 53 Cal. 686.

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CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO
EXECUTION.

714. Debtor required to answer concerning his property, when.
715. Proceedings to compel debtor to appear. In what cases he
be arrested. What bail may be given.
716. Any debtor of the judgment debtor may pay the latter's cred
717. Examination of debtors of judgment debtor, or of those ha
property belonging to him.
718. Witnesses required to testify.
719. Judge may order property to be applied on execution.
720. Proceedings upon claim of another party to property, or on
nial of indebtedness to judgment debtor.
721. Disobedience of orders, how punished.

§ 714. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he do not reside in this State, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides. [In effect March 9th, 1880

Supplementary proceedings—scope of, 7 Cal. 187; 41 Cal. 298.

Referee—7 Cal. 187.

Conduct of examination—sec. 718 and note.

Receiver—aiding proceedings, sec. 564, subd. 4; 26 Cal. 581.

§ 715. After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had toward the application of the property of the judgment debtor toward the satisfaction of the judgment, as are provided

SUPPLEMENTARY TO EXECUTION. §§ 716-18

return of an execution. Instead of the order of attendance of the judgment debtor, the sheriff, upon affidavit of the judgment creditor, his attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into a recognizance, with sufficient surety, that he will attend the court at a certain time before the judge or referee, as may be ordered, during the pendency of proceedings and until the termination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, the debtor may be committed to prison. [In effect March 1880.]

Answer—sec. 718 and note.

Attachment of property—of judgment debtor, to satisfaction of judgment creditor, sec. 719.

Writ of habeas corpus—as provisional remedy, secs. 478-504.

Persons imprisoned—on civil process, secs. 1143-1154.

Return of an execution against property—upon its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, such amount thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge of the debt, if the amount so paid.

Attachment—33 Cal. 525.

Writ of habeas corpus—to—compare sec. 544.

Return of an execution against property—upon the issuing or return of an execution against the property of the judgment debtor, or of any one of the debtors in the same judgment, or upon proof that the debtor or otherwise, to the satisfaction of the judge, the debtor or corporation has property of such judgment debtor or is indebted to him in an amount exceeding the amount of the judgment, the judge may, by an order, require such debtor or corporation, or any officer or member thereof, to appear at a specified time and place before him, or at such other time and place as may be appointed by him, and answer concerning the property.

Return of an execution—answer of—3 Cal. 253; 4 Cal. 409; 5 Cal. 118.

Attachment—equitable demands not subject of, compare 35 Cal. 525; writ of habeas corpus in custody of the law, 3 Cal. 363; otherwise, of disinterested party, 35 Cal. 392, My. P. Rep. 100.

Return of an execution—business may be required to appear and testify before the judge or referee, upon any proceeding under an execution.

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§§ 719-21 SUPPLEMENTARY TO EXECUTION.

der this chapter, in the same manner as upon the trial an issue.

Conduct of examination—41 Cal. 298.

Witnesses—excuse for absence, 6 Cal. 32: examination of, 41 Cal. 298: rights and duties of, secs. 2064-2070.

§ 719. The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to such judgment debtor, to be applied toward the satisfaction of the judgment.

Order to apply property—5 Cal. 118; 6 Cal. 16; 26 Cal. 581; 47 Cal. 115; 51 Cal. 501.

In the hands of another—50 Cal. 101.

Exempt from execution—sec. 690 and note.

§ 720. If it appear that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

Denial of debt—order to pay, improper, 51 Cal. 501.

Sham claim—38 Cal. 522.

Authorizing action—only when clear case, 5 Cal. 294; and see *SHAM CLAIM*, *supra*.

Discharge of garnishee—and discontinuance, 3 Cal. 253.

§ 721. If any person, party, or witness disobey an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

Contempt—sec. 1209 *et seq.*

TITLE X.

Actions in Particular Cases.

- CHAP.** I. Actions for the foreclosure of mortgages.
II. Actions for nuisance, waste, and willful trespass, in certain cases, on real property.
III. Actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate.
IV. Actions for the partition of real property.
V. Actions for the usurpation of an office or franchise.
VI. Of actions against steamers, vessels, and boats.

CHAPTER I.

ACTIONS FOR THE FORECLOSURE OF
MORTGAGES.

§ 726. Proceedings in foreclosure suits.

§ 727. Surplus money to be deposited in court.

§ 728. Proceedings when debt secured falls due at different times.

§ 726. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action, the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

FORECLOSURE OF MORTGAGES.

One action only—sec. 744; 24 Cal. 382; 26 Cal. 579; 27 Cal. 603; but see *Harden v. Ware*, April 7th, 1880, 5 Pac. C. L. J. 317; *Auld v. Stoddard*, April 20th, 1880, 5 Pac. C. L. J. 327.

Enforcement of mortgage—*Scope of action*, 9 Cal. 123, 365; 14 Cal. 461, 559; 18 Cal. 465; 21 Cal. 87; 53 Cal. 99, 267, 456; and see *Personal Liability*, under JUDGMENT for deficiency, note, *supra*: complaint, 10 Cal. 229; 28 Cal. 226; 46 Cal. 222; and generally, see sec. 426, and notes: parties, see note, *infra*. *Real estate*, on, see MORTGAGE GENERALLY, note, *infra*. *Personal property*, on, see Civil Code, sec. 2967; 27 Cal. 258; pledge, see Civil Code, sec. 3011.

foreclosure—*Decree, form and scope of*, 11 Cal. 11, 360; 11 Cal. 461, 559; 18 Cal. 460; 21 Cal. 589; 25 Cal. 337; 27 Cal. 418; *Ston v. Swan*, 33 Cal. 480; 39 Cal. 304, 504; 46 Cal. 638; *de Witt v. Swan*, 10 Cal. 442; effect of, 5 Cal. 337; 9 Cal. 365, 426; 11 Cal. 34, 640; 15 Cal. 313; 16 Cal. 105; 21 Cal. 103; 23 Cal. 16; 27 Cal. 50, 242, 676; 51 Cal. 242; 53 Cal. 557. *Enforcement of*, 30 Cal. 50; *Ston v. Swan*, 33 Cal. 480; 37 Cal. 223; also see WRIT OF HABEAS CORPUS, sec. 694*n*, and notes, *infra*, on SALE, AMOUNT DUE, RECEIVER, etc. *Receiver*, 6 Cal. 99; and see sec. 564, subd. 15.

numbered property—17 Cal. 626; 24 Cal. 505; 30 Cal. 367; 49 Cal. 50; on sales, generally, sec. 694 *et seq.*: fixtures, 10 Cal. 258; 11 Cal. 728; power of sale, when, 2 Cal. 387; 17 Cal. 539; 22 Cal. 50; option, sec. 700 *et seq.*; 6 Cal. 174; 14 Cal. 559; 21 Cal. 108; 22 Cal. 16; 33 Cal. 92; 34 Cal. 648; 35 Cal. 713; 40 Cal. 58, 221; 45 Cal. 549.

of proceeds—7 Cal. 84, and see following notes.

of, secs. 1021-1039.

of plaintiff—*Ascertaining*, 5 Cal. 416. *Counsel fees*, generally, 48 Cal. 369, 494; 51 Cal. 242; fixed by court, Stats. 1874, 1875, formerly, 5 Cal. 435, 492; 42 Cal. 494. *Gold coin*, 31 Cal. 108; *Interest*, 2 Cal. 697; 5 Cal. 416; 6 Cal. 155; 11 Cal. 42, 494.

of deficiency—*When proper*, 21 Cal. 76. *Docketing balance*, 2. *Sheriff's return*, 49 Cal. 233; 50 Cal. 511; 52 Cal. 664. *Notice of sale*, 1 Cal. 351; 10 Cal. 265; 22 Cal. 116; 33 Cal. 480; 34 Cal. 42; 42 Cal. 174; 51 Cal. 242; *Alexander v. Bouton*, May 1st, 1874, J. 400. *Lien*, 16 Cal. 403; 25 Cal. 337; 28 Cal. 520; 39 Cal. 520. *Set-off*, 23 Cal. 596.

of, 378, 379, 382, 389; 4 Cal. 197; 9 Cal. 96, 123; 10 Cal. 547; 11 Cal. 212; 12 Cal. 307; 13 Cal. 351; 13 Cal. 13; 14 Cal. 212; 15 Cal. 461, 530; 17 Cal. 578; 18 Cal. 473, 491, 650; 21 Cal. 87, 595; 22 Cal. 379, 505; 25 Cal. 154; 28 Cal. 194, 226; 29 Cal. 253; 30 Cal. 253, 265; 36 Cal. 390; 37 Cal. 223; 39 Cal. 58; *Carpenter v. J. 400*; 43 Cal. 159; 45 Cal. 433, 584; 49 Cal. 676; 53 Cal. 520. *Unrecorded conveyance*, 49 Cal. 678.

of, generally—see Civil Code, secs. 2920-2971: construction of notes: estate, against property of, secs. 1493*n*, 1500, 1501; *lis pendens*, sec. 312*n*; *lis pendens*, sec. 409 and notes.

of, there be surplus money remaining after payment of the amount due on the mortgage, lien, or interest, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime the same to be deposited in court.

of, court—secs. 573, 574, 2104.

of, the debt for which the mortgage, lien, or interest is held, is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterward, as often as the amount due is due, for principal or interest, the court may order more to be sold. But if the property is sold for more than the amount due, the surplus

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erty cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being rebate of interest where such rebate is proper.

Installments—18 Cal. 650; 23 Cal. 16; 38 Cal. 249; 45 Cal. 165; also, 15 Cal. 499.

CHAPTER II

ACTIONS FOR NUISANCE, WASTE AND
WILLFUL TRESPASS, IN CERTAIN
CASES, ON REAL PROPERTY.

§ 731. Nuisance defined, and actions for.

§ 732. Waste, actions for.

§ 733. Trespass for cutting or carrying off trees, etc., actions for.

§ 734. Measure of damages in certain cases under the last section.

§ 735. Damages in actions for forcible entry, etc., may be trebled.

§ 731. Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered.

Nuisance—definition, compare Civil Code, sec. 3479; also, see Civil Code, secs. 3482-3483, 3490; enjoining, 3 Cal. 90; 5 Cal. 108; 8 Cal. 332; 22 Cal. 491; *Payne v. McKinley*, April 17th, 1880, 5 Pac. O. L. J. 300; abating, 24 Cal. 359; 41 Cal. 594; 51 Cal. 416; damages, Civil Code, sec. 3484; 41 Cal. 594.

§ 732. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

Waste—damages for, 5 Cal. 239, and see sec. 746; enjoining, see sec. 746, and 15 Cal. 107; 24 Cal. 467; 34 Cal. 14.

§ 733. Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

Trespass upon timber, etc.—6 Cal. 162; 51 Cal. 303; trover 112 Cal. 184.

§ 734. Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land, or adjoining it.

§ 735. If a person recover damages for a forcible unlawful entry in or upon, or detention of, any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

Forcible entry—and unlawful detainer, treble damages, sec. 1174 Cal. 63, 161; 15 Cal. 149; 23 Cal. 375; 25 Cal. 262.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

- | 738. Parties to an action to quiet title.
- | 739. When plaintiff cannot recover costs.
- | 740. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.
- | 741. When value of improvements can be allowed as a set-off.
- | 742. An order may be made to allow a party to survey and measure the land in dispute.
- | 743. Order, what to contain and how served. If unnecessary injury done, the party surveying to be liable therefor.
- | 744. A mortgage must not be deemed a conveyance, whatever its terms.
- | 745. When court may grant injunction: during foreclosure, after sale on execution, before conveyance.
- | 746. Damages may be recovered for injury to the possession after sale and before delivery of possession.
- | 747. Action not to be prejudiced by alienation, pending suit.
- | 748. Mining claims, actions concerning to be governed by local rules.

§ 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Action to quiet title—before Code, plaintiff's possession essential, 5 Cal. 181; 6 Cal. 33; 7 Cal. 319; 12 Cal. 298, 299; 13 Cal. 107, 521; 14 Cal. 279; 15 Cal. 127; Curtis v. Sutter, 15 Cal. 259; 17 Cal. 149, 461; 21 Cal. 342, 804; 23 Cal. 71; 25 Cal. 437; 28 Cal. 194, 645; 29 Cal. 190; 30 Cal. 662; 32 Cal. 109, 620; 34 Cal. 365, 558, 563; 35 Cal. 30; 36 Cal. 313; 37 Cal. 282; 38 Cal. 679; 39 Cal. 13; 40 Cal. 58; 43 Cal. 83; 46 Cal. 162; since Code, otherwise, 46 Cal. 558; 48 Cal. 623; 49 Cal. 356, 517; 50 Cal. 485, 619; 51 Cal. 301; 52 Cal. 430, 605; 53 Cal. 18, 395, 649; generally, see citations before and since Code, *supra*.

Obligations—determining claim to, sec. 1050.

§ 739. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

Disclaimer—14 Cal. 609; 17 Cal. 282; 22 Cal. 105; 27 Cal. 331; 34 Cal. 563.

§ 740. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right

has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding property.

Commencement of action—right to recover at, 14 Cal. 465; subsequently acquired, 27 Cal. 239; 30 Cal. 467; 39 Cal. 354; 41 Cal. 47 Cal. 437.

Termination of right—22 Cal. 513.

Pendency of action—sec. 1049.

Damages—see 51 Cal. 112.

§ 741. When damages are claimed for withholding property recovered, upon which permanent improvements have been made by a defendant, or those under whom claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages.

Damages for withholding—28 Cal. 484.

Improvements—setting off value of, 2 Cal. 145; 5 Cal. 319; 8 Cal. 511; 14 Cal. 465; 18 Cal. 217, 694; 25 Cal. 44; 29 Cal. 160, 330; 31 Cal. 487; Cal. 346; 47 Cal. 56; 51 Cal. 112.

§ 742. The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of all tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action. [In effect March 10th, 1880.]

Orders, motions, etc.—sec. 1003 *et seq.*

§ 743. The order must describe the property, and a copy thereof must be served on the owner or occupant and thereupon such party may enter upon the property with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property, he is liable therefor.

§ 744. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

Construction of section—under Practice Act, 23 Cal. 16; 29 Cal. 2

Conveyance deemed mortgage—*Deed apparently absolute, so construed*: Civil Code, sec. 2925; 10 Cal. 197; 22 Cal. 116; 24 Cal. 385; 30 Cal. 685; 31 Cal. 305; 33 Cal. 333; 46 Cal. 299; proof, Civil Code, sec. 2925; Cal. 116; 15 Cal. 287; 27 Cal. 18, 603; 29 Cal. 18; 33 Cal. 686; 36 Cal. 23:

; 43 Cal. 496; 50 Cal. 207; test, 42 Cal. 169; prerequisites—*Conditional conveyance*, like construction, 22 Cal. 255; security, 9 Cal. 365; 16 Cal. 461; 17 Cal. 589; 21 Cal. 609; 17 Cal. 589. *Mortgagee's possession*, Civil Code, sec. 22 Cal. 255, 330; 24 Cal. 472; 28 Cal. 309. *Contrary construction*, 4 Cal. 256, 428; 18 Cal. 118; 26 Cal. 595; 30 Cal. 289; 33 Cal. 36; 42 Cal. 75, 236; 43 Cal. 597; 50 Cal. 23; burden of

court may by injunction, on good cause shown, prevent the party in possession from doing any act on the real property during the foreclosure proceedings thereon; or, after a sale on execution, before possession.

Generally, secs. 525-533.

Code, subd. 2.

Code, sec. 2929; 10 Cal. 265; 24 Cal. 467; Buckout v. Buckout, 10 Cal. 258; 14 Cal. 72; 23 Cal. 209.

mortgage—sec. 726 and note.

sale—sec. 694 *et seq.*

When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, sue for damages for injury to the property by the vendee or his assignee after sale and before possession is delivered to the vendee by the conveyance.

Code, sec. 745.

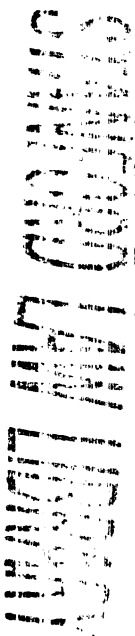
A judgment for the recovery of real property rendered against a person in possession cannot be prejudiced by any act done by such person, either before or after the date of the judgment.

Code, sec. 409 and note.

In actions respecting mining claims, proof must be made of the customs, usages, or regulations established at the bar or diggings embracing such claims, and such customs, usages, or regulations, when not inconsistent with the laws of this State, must govern the determination.

Rules, etc.—3 Cal. 224; 6 Cal. 435; 12 Cal. 426, 534; 13 Cal. 152; 16 Cal. 383; 17 Cal. 107; 18 Cal. 47, 582; 20 Cal. 152; 21 Cal. 527; 31 Cal. 387; 35 Cal. 30; 36 Cal. 219; 42 Cal. 626.

PROC.—24.



PARTITION OF REAL PROPERTY.

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

- § 752. Who may bring actions for partition.
- § 753. Interests of all parties must be set forth in the complaint.
- § 754. Lien-holders not of record need not be made parties.
- § 755. Plaintiff must file notice of *lis pendens*.
- § 756. Summons must be addressed to all persons interested in property.
- § 757. Unknown parties may be served by publication.
- § 758. Answer of defendants, what to contain.
- § 759. The rights of all parties may be ascertained in the action.
- § 760. Partial partition.
- § 761. Lien-holders must be made parties, or a referee be appointed to ascertain their rights.
- § 762. Lien-holders must be notified to appear before the referee appointed.
- § 763. The court may order a sale or partition, and appoint referee therefor.
- § 764. Partition must be made according to the rights of the parties as determined by the court.
- § 765. Referees must make a report of their proceedings.
- § 766. The court may set aside or affirm report, and enter judgment thereon. Upon whom judgment to be conclusive.
- § 767. Judgment not to affect tenants for years to the whole property.
- § 768. Expenses of partition must be apportioned among the parties.
- § 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.
- § 770. Estate for life or years may be set off in a part of the property not sold, when not all sold.
- § 771. Application of proceeds of sale of incumbered property.
- § 772. Party holding other securities may be required first to exhibit them.
- § 773. Proceeds of sale, disposition of.
- § 774. When paid into court, the cause may be continued for the termination of the claims of the parties.
- § 775. Sales by referees must be at public auction.
- § 776. The court must direct the terms of sale or credit.
- § 777. Referees may take securities for purchase-money.
- § 778. Tenants whose estate has been sold shall receive compensation.
- § 779. The court may fix such compensation.
- § 780. The court must protect tenants unknown.
- § 781. The court must ascertain and secure the value of future contingent or vested interests.
- § 782. Terms of sale must be made known at the time. Lots must be sold separately.
- § 783. Who may not be purchasers.
- § 784. Referee must make a report of the sale to the court.
- § 785. If confirmed, conveyances may be executed.
- § 786. Proceeding if a lien-holder become a purchaser.
- § 787. Conveyance must be recorded, and will be a bar against parties.
- § 788. Proceeds of sale belonging to parties unknown must be invested for their benefit.

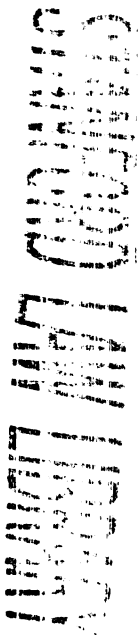
PARTITION OF REAL PROPERTY. §§ 752-3

must be made in the name of the clerk of the
interests of the parties are ascertained, securities
taken in their names.
the clerk making investments.
equal partition is ordered, compensation may be ad-
in certain cases.
of an infant may be paid to his guardian.
an of an insane person may receive the proceeds of
party's interest.
may consent to partition without action, and exe-
cuses.
partition a lien upon shares of partners.
by consent, may appoint a single referee.
if previous litigation for common benefit allowed.
title in action for partition—when cost of allowed.
now made and verified.
allowed on disbursements made under direction of the

en several cotenants hold and are in pos-
sion of property as parceners, joint tenants, or
tenants in common, in which one or more of them have
an interest in inheritance, or for life or lives, or for years,
the partition may be made by one or more of such persons
thereof according to the respective rights
of the parties interested therein, and for a sale of such
part thereof, if it appear that a partition
cannot be made without great prejudice to the owners.
for partition—are special and statutory, 19 Cal. 210;
for partition, 35 Cal. 576; delayed, when, 21 Cal. 191.
for partition—27 Cal. 91; 35 Cal. 576.
for partition—seeking partition, etc., 3 Cal. 59; 36 Cal. 112; 37
Cal. 501.
for partition—taking account, etc., 16 Cal. 464; 26 Cal. 69.
for partition—24 Cal. 218, 268; 27 Cal. 418; 46 Cal. 361; Lauterman
4th, 1880, 5 Pac. C. L. J. 527.
for partition—Civil Code, sec. 807.

interests of all persons in the property,
whether known or unknown, must be set
forth specifically and particularly, as far
as possible, in the complaint; and if one or more of the par-
ties are unknown or the quantity of interest of any of the
parties is unknown to the plaintiff, or be uncertain or
doubtful as to the ownership of the inheritance depend-
ent upon the devise, or the remainder be a contin-
gent interest, so that such parties cannot be named,
they may be set forth in the complaint.

for partition—26 Cal. 69; 27 Cal. 329; 40 Cal. 493; 48 Cal.
497. Williams, June 4th, 1880, 5 Pac. C. L. J. 527; com-
sec. 426, and notes. Parties, sec. 734; 27 Cal. 329; 35



§§ 754-8 PARTITION OF REAL PROPERTY.

Cal. 576; 36 Cal. 112; 38 Cal. 638; secs. 384, 387; and generally, secs. 389. *Unknown persons*, use of fictitious names, sec. 474; and as to summons, see sec. 756.

Abstract of title—procured before suit, sec. 799.

§ 754. No person having a conveyance of or claim a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appears of record.

Parties—see under COMPLAINT IN PARTITION, sec. 753n.

§ 755. Immediately after filing the complaint in Superior Court, the plaintiff must record in the office of the recorder of the county, or of the several counties which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record, all persons shall be deemed to have notice of the pendency of the action. [In effect March 10th, 1880.]

Lis pendens—sec. 409 and notes.

§ 756. The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown who have or claim any interest in the property.

Summons in partition—35 Cal. 587; generally, secs. 405-416; and contents, see sec. 407 and note.

§ 757. If a party having a share or interest is unknown or any one of the known parties reside out of the State or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

Service by publication—secs. 412, 413, and notes.

§ 758. The defendants who have been personally served with the summons and a copy of the complaint, who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature and extent of their respective interests in the property and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they must state the original amount and date of the same, and the sum

PARTITION OF REAL PROPERTY. §§ 759-61

thereon; also whether the same has been by any other way or not; and if secured, the extent of such security, or they are deemed to have their right to such lien.

Partition—27 Cal. 329; 33 Cal. 467; *Lauterman v. Williams*, 100 Cal. 527; late filing allowed, 46 Cal. 377; pleadings, sec. 798; answer generally, sec. 437, and notes.

Rights of the several parties, plaintiff as defendant, may be put in issue, tried, and determined; and when a sale of the premises is ordered, the title must be ascertained by proof to the court, before the judgment of sale can be entered, where service of the complaint has been made, like proof must be required of the absent or unknown parties, before such judgment is rendered; except that where there are several parties having an interest in the property, their interests are considered together in the action, and not separately.

7 Cal. 329; 32 Cal. 289; 33 Cal. 459; 48 Cal. 394.

33 Cal. 467: by referee, when, 35 Cal. 549; 43 Cal. 625.

Decree—review of, and generally, see **ORDER FOR PARTITION**, sec. 763*n*.

Costs—sec. 766, and note.

Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a partition, in the first instance, among all parties having an interest, the court may first ascertain and value the shares or interest respectively held by the parties, and thereupon adjudge and cause a sale to be made, as if such original cotenants were tenants in common and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to divide and make partition separately of each share so ascertained and allotted, as between tenants in common, under the original tenant to whom the shares have been so set apart, or may allow them to remain in common thereof, as they may desire.

It appears to the court, by the certificate of the recorder or county clerk, or by the sworn statement of any person who may have examined the records, that there are outstanding liens or encumbrances of record upon such real property, or any portion thereof, which existed and were of record at the time of the commencement of the action, the parties holding such liens are not made parties

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§§ 762-3 PARTITION OF REAL PROPERTY.

to the action, the court must either order such persons be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid or if not paid, what amount remains due thereon, their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

§ 762. The plaintiff must cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed as provided in the last section on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due or to become due contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

§ 763. If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint to the satisfaction of the court that the property or any part of it is so situated that a partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained; *provided*, that when the site of an incorporate city or town is included within the exterior boundaries of the property to be partitioned, then, on said fact being established by evidence, the following proceedings shall be had: The court shall then direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the pro-

erty for ways, roads, and streets, as in section seven hundred and sixty-four of this Code provided, and to report such survey and separate appraisement on each lot and subdivision to the court. The court may confirm, change, modify, or set aside the report in whole or in part, and if necessary appoint new referees. When, after the final confirmation of the report of such survey and appraisement, it shall appear by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city or town, or any portion thereof, will be for the best interests of the owners of the whole property, it shall order a sale thereof; *provided*, that within sixty days thereafter any tenant in common, or tenants in common, having improvements erected on any town or city lot or subdivision included in such order of sale, shall have the prior right to purchase the same at such appraised valuation, and may pay into court the amount so appraised as the value thereof, and upon such payment the title shall vest in such purchaser or purchasers, and the court shall cause to be executed by said referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers; such further proceedings shall then be had as to the remainder of the property, and the money so paid to the court, as by this chapter provided. If, during the pendency of the action, any of the parties die, or become insane or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court shall appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action; and an attorney so appointed shall be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon, in the discretion of the court. [In effect April 12th, 1880.]

Appear by the evidence—23 Cal. 501.

Partition cannot be made—27 Cal. 91.

Sale—secs. 771-794.

Order for partition—*Interlocutory character*, 35 Cal. 549. *Indispensable*, 43 Cal. 24. *Review of, new trial*, 43 Cal. 625; 45 Cal. 119: appeal, 38 Cal. 628; 43 Cal. 625.

Referee, single—sec. 797; where sale, 23 Cal. 508.

§ 764. In making partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. Before making partition of sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties or sold but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient in the judgment of said referees to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways. Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other cotenants who may not have joined in such conveyance; *provided*, that in all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each cotenant, so as to embrace as far as practicable the improvements made by such cotenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvement, in case the same can be done without material injury to the rights and interests of the other tenants

PARTITION OF REAL PROPERTY. §§ 765-8

owning such land. [Approved April 3rd,

35 Cal. 576.

35 Cal. 102.

6 Cal. 259.



referees must make a report of their pro-
viding therein the manner in which they
trust, and describing the property divided,
allotted to each party, with a particular
each share.

court may confirm, change, modify or set
rt, and if necessary, appoint new referees.
rt being confirmed, judgment must be ren-
h partition be effectual forever, which judg-
g and conclusive:

ersons named as parties to the action, and
representatives, who have at the time any in-
property divided, or any part thereof, as
or as tenants for life or for years, or as en-
reversion, remainder, or the inheritance of
or any part thereof, after the determination
estate therein, and who by any contingency
ed to a beneficial interest in the property, or
interest in any undivided share thereof, as
ears or for life;

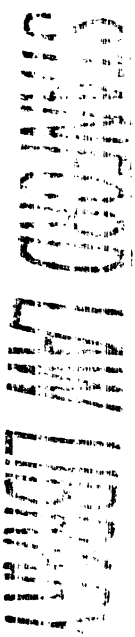
ersons interested in the property, who may
to whom notice has been given of the action
y publication;
er persons claiming from such parties or
her of them.

gment is invalidated by reason of the death
before final judgment or decree; but such
decree is as conclusive against the heirs, legal
es, or assigns of such decedent, as if it had
before his death.

partition—scope of, 41 Cal. 679; binding effect of, 32
76; 50 Cal. 376; 51 Cal. 429, 440; 53 Cal. 362: appeal from,
n, 38 Cal. 638.

judgment does not affect tenants for years
to the whole of the property which is the
partition.

expenses of the referees, including those of
nd his assistants, when employed, must be
nd allowed by the court, and the amount
her with the fees allowed by the court, in its



§§ 769-74 PARTITION OF REAL PROPERTY.

discretion, to the referees, must be apportioned among the different parties to the action, equitably.

Referee's fees—sec. 1028.

§ 769. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must be first charged with its just proportion of the costs of the partition, in preference to such lien.

§ 770. When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

§ 771. The proceeds of the sale of incumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;
4. The residue among the owners of the property sold according to their respective shares therein.

§ 772. Whenever any party to an action, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, and may order a just deduction to be made from the amount of the lien on the property, on account thereof.

§ 773. The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed to them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

Deposit in court—secs. 572-574, 2102.

§ 774. When the proceeds of the sale of any share of a parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be

adjudged by the court. Further testimony in court, or by a referee, at the discretion of the court may, if necessary, require such present the facts or law in controversy, by in an original action.

sales of real property, made by referees under, must be made at public auction to the r, upon notice published in the manner re sale of real property on execution. The ate the terms of sale, and if the property or is to be sold subject to a prior estate, charge, must be stated in the notice.

lot lots—sec. 782.
uction sales—secs. 692, 693: proceedings, sec. 694 *et seq.*

court must, in the order for sale, direct the it which may be allowed for the purchase- y portion of the premises of which it may on credit, and for that portion of which the ey is required, by the provisions hereinafter be invested for the benefit of unknown own- r parties out of the State.

referees may take separate mortgages and ies for the whole, or convenient portions of money, of such parts of the property as are ne court to be sold on credit, for the shares of wner of full age, in the name of such owner; hares of an infant, in the name of the guar- infant; and for other shares, in the name of he county and his successors in office.

e person entitled to a tenancy for life, or estate has been sold, is entitled to receive may be deemed a reasonable satisfaction for and which the person so entitled may consent ead thereof, by an instrument in writing, clerk of the court. Upon the filing of such clerk must enter the same in the minutes of

such consent be not given, filed, and entered, n the last section, at or before a judgment of ed, the court must ascertain and determine ion of the proceeds of the sale, after deduct- y, will be a just and reasonable sum to be account of such estate; and must order the paid to such party, or deposited in court for ase may require.

RECORDED
INDEXED
MAY 11 1898
CLERK OF THE COURT

§ 780. If the persons entitled to such estate for life years be unknown, the court must provide for the protection of their rights, in the same manner, as far as may be as if they were known and had appeared.

§ 781. In all cases of sales, when it appears that a person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as to protect the rights and interests of the parties.

§ 782. In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.

§ 783. Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

§ 784. After completing a sale of the property, or a part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the court where the property is situated.

§ 785. If the sale be confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

§ 786. When a party entitled to a share of the property or an incumbrancer entitled to have his lien paid out at the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

§ 787. The conveyances must be recorded in the court where the premises are situated, and shall be a bar against all persons interested in the property in any way whatsoever.

PARTITION OF REAL PROPERTY. §§ 788-92

been named as parties in the action, and such parties and persons as were unknown, if notice was served by publication, and against all persons claiming under them, or either of them, and persons having unrecorded deeds or liens at the commencement of the action. [In effect July 1st,

when there are proceeds of a sale belonging to the owner, or to a person without the State, who is a representative within it, the same must be secured by bonds of this State or of the United States, in favor of the persons entitled thereto.

When the security of the proceeds of sale is taken, an investment of any such proceeds must be made, except as herein otherwise provided, in the name of the clerk of the county where the sale is held, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

When security is taken by the referees on behalf of the parties interested in such security, by an instrument in writing, under their hands, delivered to the clerk, upon the shares and proportions to which the parties are respectively entitled; or when shares and proportions have been previously adjudged by the court, such security must be taken in the names of, and payable to, the parties respectively entitled thereto, and must be delivered to the clerk upon their receipt therefor. Such receipt and receipt must be returned and filed with the clerk.

When the clerk in whose name a security is taken, or when an investment is made, and his successors in office, receive the interest and principal as it becomes due, they must apply and invest the same as the court may direct, and must deposit with the county treasurer all moneys so received, and keep an account in a book provided for that purpose, in the clerk's office, free for the use of all persons, of investments and moneys received thereon, and the disposition thereof.

When it appears that partition cannot be made between the parties, according to their respective claims, without prejudice to the rights and interests of any party, and a partition be ordered, the court may order compensation to be made by one party to another.

RECORDED
INDEXED
MAY 11 1888
CLERK OF THE COURT

§§ 793-6 PARTITION OF REAL PROPERTY.

other, on account of the inequality; but such compensation shall not be required to be made to others by owner unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose and that his interest will be promoted thereby. And in all cases, the court has power to make compensatory adjustment between the respective parties, according to ordinary principles of equity.

Deposit in court, secs. 573, 2104.

§ 793. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale, to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

General guardian—secs. 1747-1809.

Guardian ad litem—generally, secs. 372, 373: in partition, limited powers, 19 Cal. 210.

§ 794. The guardian who may be entitled to the custody and management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking, approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative. [In effect March 10th, 1880.]

Guardians—sec. 793n.

§ 795. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release, in his behalf, to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the court.

Guardians—sec. 793n.

§ 796. The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and

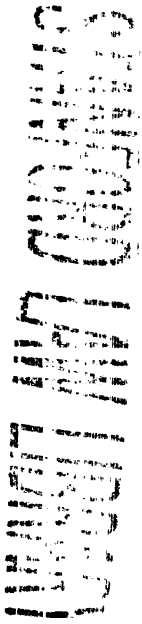
ements, must be paid by the parties respect-
d to share in the lands divided, in proportion
ective interests therein, and may be included
l in the judgment. In that case, they shall
he several shares, and the judgment may be
xecution, against such shares, and against
ty held by the respective parties. When,
igation arises between some of the parties
rt may require the expense of such litigation
y the parties thereto, or any of them. [In
t, 1874.]

471.
, etc.—sec. 678 and note.

e court, with the consent of the parties, may
ngle referee, instead of three referees, in the
nder the provisions of this chapter; and the
e, when thus appointed, has all the powers
orm all the duties required of the three ref-

t appear that other actions or proceedings
cessarily prosecuted or defended by any one
s in common, for the protection, confirmation,
of the title, or setting the boundaries, or
vey or surveys of the estate partitioned, the
llow to the parties to the action who have
ense of such litigation or other proceedings,
nses necessarily incurred therein, except
which shall have accrued to the common
e other tenants in common, with interest
the date of making the said expenditures,
ame kind of money expended or paid, and
st be pleaded and allowed by the court and
he final judgment, and shall be a lien upon
each tenant, respectively, in proportion to
nd shall be enforced in the same manner as
of partition are taxed and collected. [Ap-
y 4th, 1876.]

t appears to the court that it was necessary
e an abstract of the title to the property to
d, and such abstract shall have been pro-
plaintiff, or if the plaintiff shall have failed
ame made before the commencement of the
ny one of the defendants shall have had
t afterward made, the cost of the abstract,
thereon from the time the same is subject to
a of the respective parties to the action. must



§§ 800-1 PARTITION OF REAL PROPERTY.

be allowed and taxed. Whenever such abstract is produced [procured ?] by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action, with the clerk of the court, stating who is making the same and where it will be kept when finished. The court or the judge thereof may direct, from time to time, during the progress of the action, who shall have the custody of the abstract.

§ 800. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other officer, but instead thereof, it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected, from time to time, if found incorrect, under the direction of the court.

§ 801. Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court, or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

CHAPTER V.

FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

rights abolished.
 may be brought against any party usurping, etc., any
 or franchise.

person entitled to office may be set forth in the com-
 If fees have been received by the usurper, he may
 be sued.

may determine the rights of both incumbent and
 applicant.

may be recovered by successful applicant.
 If several persons claim the same office, their rights may be
 determined by a single action.

When defendant is found guilty, what judgment to be rendered
 against him.

Writ of *scire facias* is abolished. [In effect
 abolished, 1880.]

Writ for reviving executions, formerly, see sec. 685n.

Writ abolished by Code, restored 1880, see sec. 76, subd. 5:
 See also note to sec. 51, entitled WRITS, CERTAIN, ABOLISHED.

Action may be brought by the attorney-general
 in the name of the people of this State, upon his
 own motion, or upon the complaint of a private
 citizen, against any person who usurps, intrudes into, or
 holds or exercises any public office, civil or
 military, or franchise within this State. And the
 plaintiff must bring the action, whenever he has
 reasonable belief that any such office or franchise has
 been intruded into, or unlawfully held or exer-
 cised by any person, or when he is directed to do so by

Sec. 804: security by relator, sec. 810.

Sec. 43; 25 Cal. 98; 28 Cal. 382; 50 Cal. 433.

Usurper—10 Cal. 376; 20 Cal. 50.

Usurpation of office—quo warranto, 3 Cal. 167; 7 Cal. 393,

contesting elections, distinct, sec. 1011 *et seq.*; 28 Cal.

when, 47 Cal. 524: not by collateral proceeding, 3 Cal.

17 Cal. 626; 23 Cal. 314: certiorari improper, Lamb v.

17th, 1880, 5 Pac. C. L. J. 140.

Writ Code, sec. 358: dissolution of corporations, Civil

Code.

STANFORD LAW LIBRARY

§ 804. Whenever such action is brought, the attorney general, in addition to the statement of the cause of action may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his rights thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a justice of the Supreme Court, or a judge of the Superior Court, for the arrest of such defendant and holding him to bail; and thereupon he may be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. [In effect March 10th, 1880.]

Action—where several claimants, sec. 808.

Right to the office—proof of, 10 Cal. 377.

Complaint—14 Cal. 43; 16 Cal. 358.

Answer—28 Cal. 382.

Arrest and bail—sec. 478 *et seq.*

§ 805. In every such action, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require.

Judgment—sec. 809; 27 Cal. 470.

Review—of contested election cases, 24 Cal. 449, 457.

§ 806. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he will be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office.

§ 807. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant.

Damages sustained—28 Cal. 21, 51.

§ 808. When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

§ 809. When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise

judgment must be rendered that such defendant is excluded from the office, franchise, or privilege, that he pay the costs of the action. The court, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when levied, must be paid into the treasury of the State.

When the action is brought upon the information of a private party, the attorney-general may require such party to enter into an undertaking, to be approved by the attorney-general, that such party or the sureties will pay any judgments or damages recovered against the plaintiff, and the costs and expenses incurred in the prosecution.

[In effect July 1st, 1874.]

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CHAPTER VI.
OF ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS.

- § 813. When vessels, etc., are liable. Their liabilities constitute liens.
 § 814. Actions may be brought directly against such vessels, etc.
 § 815. Complaint must be verified.
 § 816. Summons may be served on the master, mate, etc.
 § 817. Plaintiff may have such vessel, etc., attached.
 § 818. The clerk must issue the writ of attachment.
 § 819. Such writ must be directed to the sheriff. Sheriff may release upon sufficient undertaking.
 § 820. Sheriff must execute such writ without delay.
 § 821. The owner, master, etc., may appear and defend such vessel.
 § 822. Proceedings in actions under this chapter.
 § 823. After appearance, attachment may, on motion, be discharged.
 § 824. When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds.
 § 825. Mariners and others may assert their claim for wages, notwithstanding prior attachment. How enforced.
 § 826. Proof of the claims of mariners and others.
 § 827. Sheriff's notice of sale to contain measurement, tonnage, etc.

§ 813. All steamers, vessels, and boats are liable:

1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees;
2. For supplies furnished in this State for their use, or on the request of their respective owners, masters, agents, or consignees;
3. For work done or materials furnished in this State for their construction, repair, or equipment;
4. For their wharfage and anchorage within this State;
5. For non-performance, or malperformance, of any contract for the transportation of persons or property between places within the State, made by their respective owners, masters, agents, or consignees;
6. For injuries committed by them to persons or property, in this State.

Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in the order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued. [In effect July 1st, 1874.]

Section constitutional—jurisdiction of State Courts, 1 Cal. 485; 2 Cal. 308; 5 Cal. 288; 9 Cal. 697; 13 Cal. 369; 34 Cal. 676; 42 Cal. 227, 469; 50 Cal. 235.

ACTIONS AGAINST STEAMERS, ETC. §§ 814-17

section—admiralty procedure inapplicable, 18 Cal.

Services rendered—seamen's wages, sec. 114; 1 Civil Code, sec. 2079.

Supplies furnished—request of master, 50 Cal.

Transportation, contract for—of passengers, 13 Cal.; of property, 6 Cal. 462; 42 Cal. 227.

Injuries to property—collision, 2 Cal. 370.

Wages, 8 Cal. 418: defined, sec. 1180.

For all other demands, as to labor claims, see secs. 1180-1184.

Year, when begins, 29 Cal. 419.

Actions for any of the causes specified in the section must be brought against the owners by the plaintiff, but if not known, that fact shall be stated in the complaint, and the defendants shall be designated as unknown owners. Other persons having a lien on the vessel may be made defendants in the action, the amount of such lien being stated in the complaint. [In effect July 1st, 1874.]

Designation—fictitious designation of, sec. 474.

Cal. 526: generally, sec. 367 *et seq.*

Complaint must designate the steamer, vessel, name, and must be verified by the oath of the plaintiff or some one on his behalf.

General, sec. 426a.

Readings—sec. 446.

Summons and copy of the complaint must be served on the owners if they can be found; otherwise, on the master, mate, or person having charge of the steamer, vessel, or boat. [In effect March 1st, 1874.]

Summons—on person, confers jurisdiction, 2 Cal. 308: generally, *et seq.*

Plaintiff, at the time of issuing the summons, may have the steamer, vessel, with its tackle, apparel, and furniture, attached to the satisfaction of any judgment recovered in the action. [In effect July 1st, 1874.]

Not necessary to acquire lien on vessel, 7 Cal. 405, and generally, sec. 537 *et seq.*

Steamer or boat—used in navigating the waters of this State, 1 Cal. 162.



§§ 819-22 ACTIONS AGAINST STEAMERS, ETC.

§ 818. The clerk of the court must issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if the judgment be rendered in favor of the owner of the steamer, vessel, or boat, as the case may be, he will pay all costs and damages that may be awarded against him or all damages that may be sustained by him from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars. [In effect July 1st, 1874.]

Attachment bond—generally, compare sec. 539.

Undertakings—generally, sec. 941a: qualifications of sureties, sec. 1057.

§ 819. The writ must be directed to the sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such steamer, vessel, or boat, with its tackle, apparel, and furniture, and keep the same in his custody until discharged in due course of law. [In effect July 1st, 1874.]

§ 820. The sheriff to whom the writ is directed and delivered must execute it without delay, and must attach and keep in his custody the steamer, vessel, or boat named therein, with its tackle, apparel, and furniture, until discharged in due course of law; but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel, or boat, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook, or other persons employed on board. [In effect July 1st, 1874.]

§ 821. The owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, on behalf of the owner, appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on behalf of the plaintiff, and may require sureties to justify, as upon bail on arrest. [In effect July 1st, 1874.]

Appearance—sec. 1014.

Answer—sec. 437 and notes.

Justification of sureties—sec. 495.

§ 822. After the attachment is levied, the owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, on behalf of the owner, have the attachment discharged, upon giving to the sheriff an undertaking of at least two sufficient sureties in an amount sufficient

demand in suit, besides costs, or depositing with the sheriff. Upon receiving such undertaking, the sheriff must restore to the owner, or agent, or consignee of the owner, the steamer, or vessel attached. [In effect July 1st, 1874.]

—1 Cal. 165, and compare sec. 540: undertakings, see

for the appearance in the action of the owner, or agent, may, on motion, also be discharged, in the same manner, and on like terms and conditions, as at other cases, subject to the provisions of sec. 540. [In effect July 1st, 1874.]

Attachment—secs. 554-558.

The attachment be not discharged, and a writ of habeas corpus be issued in the action in favor of the plaintiff, or execution be issued thereon, the sheriff must sell, at public auction, after publication of notice of such sale, the steamer, vessel, or boat, with its cargo, and furniture, or such interest therein as may be attached, and must apply the proceeds of the sale to the satisfaction of the judgment.

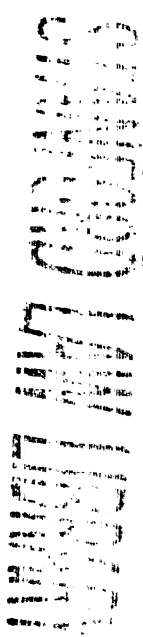
In an action brought for demands other than wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of such wages, as specified in the execution, the sheriff must apply the proceeds of the sale to the payment of such wages, as specified in the execution.

Payment of the judgment and costs, including the expenses of the attachment, and the balance remaining to the owner, or agent, or consignee, who may have a claim against the steamer, vessel, or boat, or the proceeds of the sale, or if there be no appearance in court, subject to the claim of any party entitled thereto. [In effect July 1st, 1874.]

Attachment—generally. sec. 694 *et seq.*
Attachment—secs. 572-574, 2104.

Attachment—generally. sec. 694 *et seq.*
Attachment—secs. 572-574, 2104.

A mariner, boatman, or other person employed in the service of the steamer, vessel, or boat attached, who may wish to assert his claim for wages against the steamer, vessel, or boat, or the proceeds of the sale, or attachments being issued for other demands against the steamer, vessel, or boat, may file an affidavit of his claim, setting forth the amount and the particular service rendered, and the amount of the claim, before the court, or judge of the court; and thereafter no attachment shall be issued upon filing an undertaking, unless the amount of the claim, or the amount determined as provided in the next section, be covered thereby, in addition to the amount of the claim, or the amount determined as provided in the next section.



§§ 826-7 ACTIONS AGAINST STEAMERS, ETC.

to the other requirements; and any execution issued against such steamer, vessel, or boat, upon judgment covered thereafter, must direct the application of the proceeds of any sale:

1. To the payment of the amount of such claims and of the amount determined as provided in the next section, which amount the clerk must insert in the writ;

2. To the payment of the judgment and costs and sheriff's fees; and must direct the payment of any balance due the owner, master, or consignee who may have appeared in the action; but if no appearance by them be made therein, it must direct a deposit of the balance in court. [In effect July 1st, 1874.]

Preferred claims—for wages, etc., secs. 1204-1206. .

Deposit in court—secs. 572 *et seq.*, 2104.

§ 826. If the claim of the mariner, boatman, or other person, filed with the clerk of the court, as provided in the last section, be not contested within five days after notice of the filing thereof by the owner, master, agent, or consignee of the steamer, vessel, or boat against which the claim is filed, or by any creditor, it shall be deemed admitted; but if contested, the clerk must indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest, and must immediately thereupon order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the clerk or referee may be reviewed by a court in which the action is pending, or by the judge thereof, immediately after the same is given, and the judgment of the court or judge shall be final. On review, the court or judge may use the minutes of the proofs taken by the clerk or referee, or may take new proofs anew. [In effect March 10th, 1880.]

§ 827. The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition.

TITLE XI.

Proceedings in Justices' Courts.

Place of trial of actions in Justices' Courts.
Manner of commencing actions in Justices' Courts.
Proceedings in Justices' Courts.
Provisional remedies in Justices' Courts.
Judgment by default in Justices' Courts.
Time of trial and postponements in Justices' Courts.
Fees in Justices' Courts.
Judgments (other than by default) in Justices' Courts.
Executions from Justices' Courts.
Contempts in Justices' Courts.
Warrants of justices.
General provisions relating to Justices' Courts.

cc.—26. [301]

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CHAPTER I.

PLACE OF TRIAL OF ACTIONS IN JUSTICE
COURTS.

- § 832. Actions, in what township or city may be commenced.
833. Place of trial may be changed in certain cases.
834. Limitation on the right to change.
835. To what court transferred.
836. Proceedings after order changing place of trial.
837. Effect of an order changing place of trial.
838. Transfer of cases to the District Court.

§ 832. Actions in Justices' Courts must be commenced, and, subject to the right to change the place of trial, as this chapter provided, must be tried:

1. If there be no Justices' Court for the township or city in which the defendant resides—in any city or township of the county in which he resides;

2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties—in the township or city in which any of the persons liable may reside;

3. In cases of injury to the person or property—in the township or city where the injury was committed, where the defendant resides;

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same—the township or city in which the property may be found, or in which the property was taken, or in which the defendant resides;

5. When the defendant is a non-resident of the county in any township or city wherein he may be found;

6. When the defendant is a non-resident of the State—in any township or city in the State;

7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary;

the parties voluntarily appear and plead with-
—in any township or city in the State;
other cases—in the township or city in which
he resides. [In effect July 1st, 1874.]

of Justices' Courts—secs. 112-115, 925.
a jurisdictional fact, 15 Cal. 296; 18 Cal. 123; 34 Cal. 321.

the court may, at any time before the trial, on
change the place of trial in the following cases:
1. Where it appears to the satisfaction of the justice before
whom the action is pending, by affidavit of either
party that such justice is a material witness for either

the other party makes and files an affidavit that
he cannot have a fair and impartial trial
before the justice, by reason of the interest, prejudice,
or partiality of the justice;

2. Where a jury has been demanded, and either party
files an affidavit that he cannot have a fair
and impartial trial, on account of the bias or prejudice of
the justice of the township or city against him;
3. Where, from any cause, the justice is disqualified from

acting, if the justice is sick or unable to act.
The order—generally, sec. 397 et seq.: effect of order for, 50

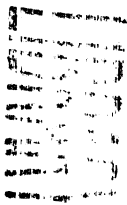
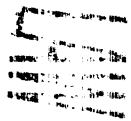
2. Partiality alleged—transfer imperative, 5 Cal. 507;

the place of trial cannot be changed, on motion
of either party, more than once, upon any or all the
trials held in the first, second, and third subdivis-
ions of the preceding section.
The order—see first section.

When the court orders the place of trial to be
changed, the action must be transferred for trial to a court
which the parties may agree upon; and if they do not so agree,
to the nearest Justice's Court in the same county.

After an order has been made, transferring the
action to another court, the following proceedings

shall be observed: The justice ordering the transfer must immediately
transfer to the justice of the court to which it is trans-
ferred all the papers in the action, together
with a transcript from his docket of the proceed-



2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue notice, stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial.

§ 837. From the time the order changing the place of trial is made, the court to which the action is there transferred has the same jurisdiction over it as though it had been commenced in such court.

Jurisdiction vests—50 Cal. 441.

Further change of venue—22 Cal. 34.

§ 838. The parties to an action in a Justices' Court cannot give evidence upon any question which involves title or possession of real property, or the legality of a tax, impost, assessment, toll, or municipal fine, nor can any issue presenting such question be tried by such court, and if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same, from his docket to the clerk of the Superior Court of the county; and from the time of filing such pleadings or transcript with the clerk, the Superior Court shall have over the action the same jurisdiction as if it had been commenced therein; *provided*, that in cases of forcible entry and detainer, of which Justices' Courts have jurisdiction, any evidence, otherwise competent to be given, and any question properly involved therein may be determined. [In effect March 26th, 1880.]

Certifying to Superior Court—from Justices' Courts in cities and counties, see sec. 92: mandamus for refusal, 50 Cal. 509.

Title or possession of realty involved—see sec. 112, subd. 2 and notes; also 31 Cal. 140: trespass, when within jurisdiction, 53 Cal. 23.

Legality of tax, etc., involved—see sec. 112, subd. 4 and note; 24 Cal. 61.

Forcible entry and detainer—jurisdiction of, sec. 113, subd. 1 and note.

CHAPTER II.

OF COMMENCING ACTIONS IN JUSTICES' COURTS.

ons, how commenced.
 mmons may issue within a year.
 endant may waive summons.
 ties may appear in person or by attorney.
 en guardian necessary, how appointed.
 mmons, how issued, directed, and what to contain.
 e for appearance of defendant.
 s summons.
 e.
 mmons, limitation upon time of service.
 mmons, by whom and how served and returned.
 r for appearance.

n action in a Justice's Court is commenced by
 plaint. [In effect March 11th, 1876.]

ment of action—generally, secs. 350, 405: pendency

—generally, sec. 426 and notes.

cities and counties, title, etc., sec. 89.

he court must indorse on the complaint the
 which it was filed, and at any time within one
 after the plaintiff may have summons issued.

s summons—generally, sec. 406.

f fees—in cities and counties, sec. 91.

t any time after the complaint is filed, the
 may, in writing, or by appearing and pleading,
 ssuing of summons.

mpare sec. 406.

arties in Justices' Courts may appear and act
 r by attorney; and any person, except the con-
 whom the summons or jury process was served,
 attorney.

ourt practitioners—sec. 96, and note.

—generally, sec. 275, *et seq.*

When an infant, insane, or incompetent person
 he must appear either by his general guardian,
 one, or by a guardian *ad litem* appointed by

When a guardian *ad litem* is appointed by
 he must be appointed as follows:

1. If the infant, insane, or incompetent person be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane or incompetent, upon the application of a relative or friend.

2. If the infant, insane, or incompetent person be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the infant, if he be of the age of fourteen years and apply at or before the summons is returned. If he be under the age of fourteen, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice, on his own motion. [In effect March 26th, 1880.]

Guardians—compare secs. 372, 373, and notes.

§ 844. The summons must be directed to the defendant, and signed by the justice, and must contain:

1. The title of the court, name of the county and city or township in which the action is commenced, and the names of the parties thereto;

2. A sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him;

3. A direction that the defendant appear and answer before the justice, at his office, as specified in sec. 845 of this Code;

4. In an action arising on a contract for the recovery of money or damages only, a notice that unless the defendant so appear and answer, the plaintiff will take judgment for the sum claimed by him (stating it);

5. In other actions, a notice that unless defendant appear and answer, the plaintiff will apply to the court for the relief demanded. If the plaintiff has appeared by attorney, the name of the attorney must be indorsed upon the summons. [In effect March 26th, 1880.]

Contents of summons—compare sec. 407, and note.

Intendments—as to inferior courts, sec. 53*n*; 33 Cal. 322.

§ 845. The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest be indorsed upon the summons, forthwith;

2. In all other cases, the summons must contain a direction that the defendant must appear and answer to the complaint within five days, if the summons be served in the city and county, township, or city, in which the action

within ten days, if served out of the township in the county in which the action is brought, twenty days, if served elsewhere. [In effect 1880.]

Appearance—generally, sec. 407; subd. 3, note: in Justices' Courts—see sec. 403; 23 Cal. 85; 34 Cal. 646.

If the summons is returned without being answered by any or all of the defendants, the justice, on the demand of the plaintiff, may issue an alias summons in the same form as the original, except that the time for the appearance of the defendant shall not exceed ninety days from its date.

Appearance—generally, compare, sec. 408.

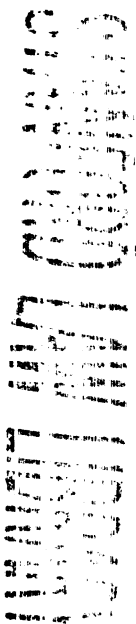
A justice may, within a year from the date of the complaint, issue as many alias summonses as may be demanded by the plaintiff.

Appearance—see sec. 403.

A summons cannot be served out of the county before whom the action is brought, except when it is brought upon a joint contract or obligation of two or more persons, who reside in different counties, and the summons has been served upon the defendant in the county, in which case the summons may also be served upon the other defendant out of the county, except, also, when an action is brought upon a contract to perform an obligation in a particular place, and resides in a different county, in which case summons may be served in the county where he resides; and except, also, where an action is brought for injury to person or property, and the defendant resides in a different county, in which case the summons may be served in the county where the defendant resides. [Approved April 3rd, 1876.]

Justices' Courts—extent of, secs. 94, 106: constitutionally, 14 Cal. 158.

A summons may be served by a sheriff or constable of any of the counties of this State: *provided*, that the summons, issued by a justice of the peace, is to be served in the county in which it was issued, the justice shall have attached to it a certificate under seal of the clerk of such county, to the effect that the justice was an acting justice of the peace at the time of the summons; or the summons may be served by any male resident, over the age of twenty-one years, and a party to the suit, within the county where the



action is brought, and must be served and returned provided in Title V, Part II, of this Code, (secs. 405-416) it may be served by publication, and secs. 413 and 412 far as they relate to the publication of summons, are inapplicable to Justices' Courts; the word "justice" be substituted for the word "judge," whenever the latter word occurs. [In effect May 27th, 1874.]

Service of summons—generally: *Sheriff and deputies*—for Justices' Courts in cities and counties, sec. 87: *Constable*—see Political Code secs. 4314, 4315; 4 Cal. 188.

§ 850. When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice may fix a day for the trial of said cause, and notify the plaintiff and the defendants who have appeared, thereof. The parties are entitled to one hour in which to appear at the time fixed in the said notice, but are not bound to remain longer than that time, unless both parties have appeared, and the justice, being present, is engaged in the trial of another cause. [Approved April 3rd, 1876.]

Time of trial—sec. 873 *et seq.*

CHAPTER III.

PLEADINGS IN JUSTICES' COURTS.

Form of pleadings.
 Pleadings in Justices' Courts.
 Complaint defined.
 When demurrer to complaint may be put in.
 Answer.
 When the defendant omits to set up counter-claim.
 When plaintiff may demur to answer.
 Proceedings on demurrer.
 Amendment of pleadings.
 Answer or demurrer to amended pleadings.

Pleadings in Justices' Courts—
 required to be in any particular form, but
 so as to enable a person of common under-
 standing to know what is intended;
 except the complaint, be oral or in writing;
 must be verified, unless otherwise provided in this
 chapter; must be filed with the justice;
 an entry of their substance must be made in

3. Verified answer—sec. 112, subd. 2, sec. 838.
 Amendment of pleadings—in Justices' Courts, 4 Cal. 120; 6
 Cal. 373; 16 Cal. 372; 20 Cal. 282.

Pleadings are—
 complaint by the plaintiff;
 demurrer to the complaint;
 answer by the defendant;
 demurrer to the answer.

Amendments—generally, sec. 422.

A complaint in Justices' Courts is a concise
 statement in writing, of the facts constituting the plaintiff's
 cause of action; or a copy of the account, note, bill,
 or other document upon which the action is based.
 Generally, sec 426, and notes.

A defendant may, at any time before answering,
 demur to the complaint.
 Generally, sec. 430, and notes.

An answer may contain a denial of any or all
 material facts stated in the complaint, which the

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defendant believes to be untrue, and also a statement in a plain and direct manner, of any other facts constituting a defense or counter-claim, upon which an action might be brought by the defendant against the plaintiff in the Justices' Court.

Answer—in Justices' Courts, 17 Cal. 80; 20 Cal. 48; 23 Cal. 16; 30 Cal. 545; objection to jurisdiction by, 6 Cal. 447; as waiver, 8 Cal. 339; generally, sec. 437 and notes.

Counter-claim—above \$300, beyond jurisdiction, 23 Cal. 61.

§ 856. If the defendant omit to set up a counter-claim in the cases mentioned in the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

Counter-claim waived—generally, sec. 439, and note.

§ 857. When the answer contains new matter in avoidance, or constituting a defense or a counter-claim, the plaintiff may, at any time before the trial, demur to the answer on the same for insufficiency, stating therein the grounds of such demurrer.

Demurrer to answer—generally, sec. 443.

§ 858. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days as the court allows, amend his complaint;
2. If the demurrer to a complaint is overruled, the defendant may answer forthwith;
3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow;
4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

Proceedings on demurrer—compare secs. 472, 636.

§ 859. Either party may, at any time before the conclusion of the trial, amend any pleading, but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will be rendered necessary, require, as a condition to the allowance of such amendment, made after the issue joined, the payment of costs to the adverse party to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment.

against him by his mistake, inadvertence, culpable neglect, but the application for such amendment made within ten days after the entry of the judgment upon an affidavit showing good cause there-

for, of Justices' Court pleadings, 10 Cal. 342; 11 Cal. 473 and notes: adjournment for, sec. 874,

when a pleading is amended, the adverse party may demur to it within such time, not exceeding such time as the court may allow.

-compare sec. 432.

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CHAPTER IV.
**PROVISIONAL REMEDIES IN JUSTICE
 COURTS.**

- ART. I. ARREST AND BAIL.
 II. ATTACHMENT.
 III. CLAIM AND DELIVERY OF PERSONAL PROPERTY.

ARTICLE I.

ARREST AND BAIL.

861. Order of arrest and arrest of defendant.
 862. Affidavit and undertaking for order of arrest.
 863. A defendant arrested must be taken before the justice immediately.
 864. The officer must give notice to the plaintiff of arrest.
 865. The officer must detain the defendant.

§ 861. An order to arrest the defendant may be endorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly charged, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors;
2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity;
3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought;
4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female can be arrested in any action.

Arrest and bail—generally, sec. 478 *et seq.*

Process of Justices' Courts—extent of, see sec. 848a.

§ 862. Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, t

which the application is founded. The plaintiff also execute and deliver to the justice a written undertaking in the sum of three hundred dollars, with two sureties, to the effect that the plaintiff will pay the sum that may be adjudged to the defendant, and all costs which he may sustain by reason of the arrest, if he be wrongful, or without sufficient cause, not the sum specified in the undertaking. [In effect of § 874.]

and undertaking for arrest—compare secs. 481, 482.

The defendant, immediately upon being arrested, must be taken to the office of the justice who issued the order, and if he is absent or unable to try the case, if it appears to him by the affidavit of the defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice in the township or city, if there is another, and if there is no justice in the township or city, before the justice of an adjoining township, who has jurisdiction of the action, and proceed thereon, if a summons had been issued and the order of arrest by him.

The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and endorse on the summons, and subscribe a certificate of the time of serving the same, the time of giving notice, and of his giving notice to the plaintiff.

The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice.

ARTICLE II.

ATTACHMENT.

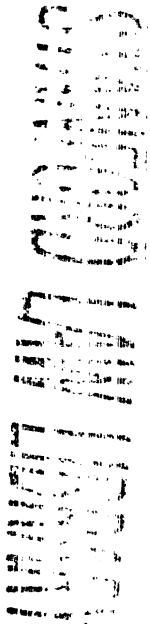
An attachment shall issue upon affidavit. No writ of habeas corpus on attachment must be required. No writ of attachment, substance of. Officer may take an undertaking instead of levying. The provisions apply to all attachments in Justices' Courts.

A writ to attach the property of the defendant may be issued by the justice at the time of, or after issuing a summons and before answer, on receiving an affidavit on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section 863 and thirty-eight of this Code.

Attachment—generally, sec. 537 *et seq.*

Attachment on summons—23 Cal. 89.

IV. PROC.—27.



§ 867. Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than fifty nor more than three hundred dollars, to the effect that if the defendant recover judgment, the plaintiff will pay the costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Undertaking on attachment—generally, sec. 539 and notes.

§ 868. The writ may be directed to the sheriff or a constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; in which case, to take such undertaking.

Contents of writ—compare sec. 540.

§ 869. The sections of this Code from section five hundred and forty-one to section five hundred and fifty-nine, both inclusive, are applicable to attachments issued in Justices' Courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge."

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 870. How claim and delivery enforced.

§ 870. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this Code, from section five hundred and ten to section five hundred and twenty-one, both inclusive, are applicable to such claim when made in Justices' Courts, the power therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge."

Claim and delivery—generally, sec. 509 *et seq.*

CHAPTER V.

JUDGMENT BY DEFAULT IN JUSTICES' COURTS.

- 71. Judgment when defendant fails to appear.
- 72. Judgment against defendant on demurrer.

If the defendant fail to appear, and to answer within the time specified in the summons, then, after service of summons, the following proceedings shall be had:

If the action is based upon a contract, and is for the recovery of money, or damages only, the court must render judgment in favor of plaintiff for the sum specified in the summons;

In all other actions the court must hear the evidence of the plaintiff, and must render judgment in his favor for such sum (not exceeding the amount stated in the summons) as appears by such evidence to be just. [In force from 16th, 1880.]

Judgment—generally, sec. 585.

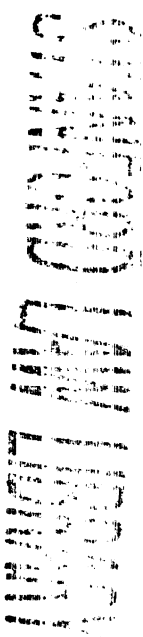
In the following cases the same proceedings shall be had, and judgment must be rendered in like manner as if the defendant had failed to appear and answer to the complaint:

1. Where the complaint has been amended, and the defendant fails to answer it as amended, within the time allowed by the court;

2. Where a demurrer to the complaint is overruled, and the defendant fails to answer at once;

3. Where a demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

See sec. 858 and notes.



CHAPTER VI.

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.

§ 873. Time when trial must be commenced.

§ 874. When court may, of its own motion, postpone trial.

§ 875. Postponement by consent.

§ 876. Postponement upon application of a party.

§ 877. No continuance for more than ten days to be granted, unless upon filing of undertaking.

§ 873. Unless postponed as provided in this chapter, unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in section 850, and the trial must be continued without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of. [Approved April 3rd, 1876]

§ 874. The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action;

2. For not exceeding two days, if, by an amendment to the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

SUBDIVISION 2. Amendment of pleadings, etc.—see secs. 858, 859

§ 875. The court may, by consent of the parties, give in writing or in open court, postpone the trial to a time agreed upon by the parties.

§ 876. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

application is on the part of the plaintiff, and defendant is under arrest, a postponement for more than twenty-four hours discharges the defendant from custody; and the action may proceed notwithstanding, and the defendant is not subject to arrest on execution, in the same manner as if he had not been discharged:

where the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by the justice, and in a sum to be fixed by, the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to pay the judgment to be issued to enforce the judgment therein; and the sureties will pay to the plaintiff the amount of the judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice shall order the defendant to be discharged from cus-

ody of the party making the application must, if required by the adverse party, consent that the testimony of any such adverse party, who is in attendance, may be taken by deposition before the justice, and that the deposition so taken may be read on the trial, with the same effect, and subject to the same objections, as if the deposition had been produced.

The court may require the party making the application to file, upon affidavit, the evidence which he expects to produce; and if the adverse party thereupon admit that the evidence would be given, and that it be considered as given on the trial, or offered and overruled as improper, the trial must not be postponed.

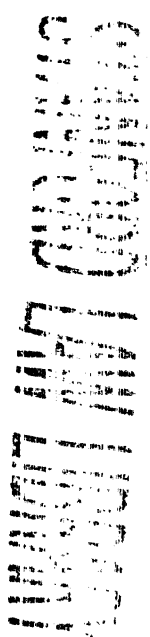
Costs—generally, sec. 595, and notes: costs of, sec. 1029.

Costs, sureties, etc.—secs. 941a, 1057.

Sections 2 and 3. Arrest and bail—sec. 478 *et seq.*

No adjournment must, unless by consent, be for a period longer than ten days, upon the application of either party, except upon condition that such an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the applicant, not exceeding the sum specified in the undertaking.

Costs—see sec. 876a.



CHAPTER VII.

TRIALS IN JUSTICES' COURTS.

878. Issue defined, and the different kinds.
 879. Issue of law, how raised.
 880. Issue of fact, how raised,
 881. Issue of law, how tried.
 882. Issue of fact, how tried.
 883. Jury, how waived.
 884. Either party failing to appear, trial may proceed at request of other party.
 885. Challenges to jurors.
 886. Manner of pleading a written instrument.
 887. If a copy of an instrument be filed, the signatures will be deemed admitted, unless denied under oath.

§ 878. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Same as sec. 588.

§ 879. An issue of law arises upon a demurrer to a complaint or answer, or to some part thereof.

Same as sec. 589.

§ 880. An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matter in the answer, except an issue of law is joined thereon.

Same as sec. 590.

§ 881. An issue of law must be tried by the court.

Compare—sec. 591.

§ 882. An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

Compare—sec. 592.

§ 883. A jury may be waived—

1. By consent of parties, entered in the docket;
2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact;

failure of either party to appear at the time of trial of an issue of fact.

—compare sec. 631, and notes.

either party fails to appear at the time fixed for trial may proceed at the request of the ad-

cc. 594.

challenges are either peremptory or for cause. A party is entitled to three peremptory challenges. A party may challenge for cause on any ground set forth in section six hundred and two. Challenge for cause must be tried by the justice.

—compare secs. 601, 602.

When the cause of action or counter-claim arises out of an account or instrument for the payment of money or for the delivery of an instrument, at any time before the trial, may, by an order, require the original to be exhibited to the court, and a copy to be furnished to the defendant, at such time as may be fixed in the order; or, if the order is not obeyed, the account or instrument may be taken in evidence.

—section—sec. 1000.

When the plaintiff annex to his complaint, or file with the summons at the time of issuing the summons, the copy of the promissory note, bill of exchange, or other written obligation for the payment of money, and when the action is brought, the defendant is deemed to have admitted the genuineness of the signatures of the makers, assignors thereof, unless he specifically denies the same in his answer, and verify the answer by his oath.

secs. 447, 853.

bonds—by printed *fac simile*, 48 Cal. 565.

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CHAPTER VIII.

JUDGMENTS (OTHER THAN BY DEFAULT)
IN JUSTICES' COURTS.

- § 889. Judgment by confession.
- § 890. Judgment of dismissal entered in certain cases without prejudice.
- § 891. Judgment upon verdict.
- § 892. Judgment after trial by the court.
- § 893. Judgment when the defendant is subject to arrest.
- § 894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.
- § 895. Offer to compromise before trial.
- § 896. Costs may be included in the judgment.
- § 897. Abstract of judgment.
- § 898. Abstract may be filed and docketed in county clerk's office.
- § 899. Effect of docketing.
- § 900. Judgment not a lien unless abstract is recorded in the record office.

§ 889. Judgments upon confession may be entered in any Justices' Court specified in the confession.

Confession of judgment—8 Cal. 76; sec. 1135; and generally, s. 1132-1135: jurisdiction, sec. 112, subd. 6.

§ 890. Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted;
2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter;
3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court;
4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county or township, or city; but if the objection is taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

Dismissal, etc.—compare sec. 581, and notes: effect of, 29 Cal. 312.

SUBDIVISION 4. Action brought, where—sec. 832. Appears by evidence—18 Cal. 128. Waiver of objection—15 Cal. 298; and compare sec. 434 and note.

When a trial by jury has been had, judgment rendered by the justice, at once, in conformity with the verdict.

Judgment—*Lynch v. Kelly*, 41 Cal. 432: generally, sec. 664, and note to sec. 664.

When the trial is by the court, judgment must be rendered at the close of the trial.

Judgment in Justices' Courts must be essentially in the form required by section six and sixty-seven of this Code. When the judgment is rendered in a case where the defendant is subject to imprisonment thereon, the fact that the defendant is a subject, must be stated in the judgment. [Section 891, Act of March 1st, 1874.]

Judgment against the person, extent of process—sec. 848n.

When the amount found due to either party exceeds the amount for which the justice is authorized to enter judgment, the court may remit the excess, and judgment be rendered for the residue.

When the amount exceeds one hundred dollars, sec. 112.

When the defendant, at any time before the trial, offers to allow judgment to be taken against him for a specified sum, the plaintiff may immediately accept thereof, with the costs then accrued; but if he does not accept such offer before the trial, and fail to take action a sum in excess of the offer, he cannot recover the costs, but costs must be adjudged against him if he fails to recover, be deducted from his recovery. [Section 891, Act of March 2nd, 1878.]

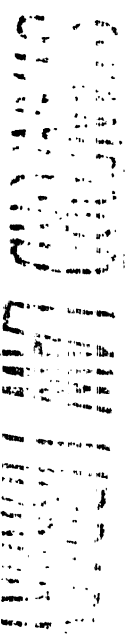
Judgment—compare, sec. 997.

Judgment must tax and include in the judgment the costs allowed by law to the prevailing party.

Costs—percentage in San Francisco, see Stats. 1866, p. 66.

Judgment, on the demand of a party in whose favor judgment is rendered, must give him an abstract of judgment in substantially the following form (filling in the facts):

CALIFORNIA, — county, (or city and county).
v. —, defendant. In Justices' Court, before me, the undersigned justice of the peace, — township (or city, or county), —, 18— [inserting date of abstract].



Judgment entered for plaintiff, (or defendant) for \$— on the — day of —. I certify that the foregoing is correct abstract of a judgment rendered in said action in my court—or (as the case may be) in the court of — justice of the peace, as appears by his docket now in my possession, as his successor in office. — —, Justice of the Peace. [In effect March 26th, 1880.]

Abstract—52 Cal. 399: transcript, formerly, 27 Cal. 371: in cities and counties, sec. 92.

§ 898. The abstract may be filed in the office of the county clerk of the county in which the judgment was rendered, and the judgment docketed in the judgment docket of the Superior Court thereof. The time of filing the abstract by the clerk must be noted on the docket, and entered in the docket. [In effect March 26th, 1880.]

Docketing—generally, sec. 671.

Recalling—49 Cal. 269.

§ 899. From the time of docketing in the county clerk's office, execution may be issued thereon by the county clerk to the sheriff of any county in the State other than the county in which the judgment was rendered, in the same manner and with like effect as if issued on a judgment of the Superior Court. [In effect March 26th, 1880.]

Execution—generally, sec. 681 *et seq.*

§ 900. A judgment rendered in a Justice's Court creates no lien upon any lands of the defendant, unless such an abstract is filed in the office of the recorder of the county in which the lands are situated. When so filed, and from the time of filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied. [In effect April 16th, 1880.]

No lien—unless abstract filed and recorded, 52 Cal. 399.

Recording—sec. 674; 19 Cal. 145.

Lien, extent and duration of—compare, sec. 674.

1461

CHAPTER IX.

WARRANTS FROM JUSTICES' COURTS.

Warrant may issue at any time within five years.
Form, contents of.
Form of execution.
Duty of officer receiving execution.
Findings supplementary to execution.

Warrant for the enforcement of a judgment
Court may be issued by the justice who
rendered judgment, or his successor in office, on the
part of the party entitled thereto, at any time
within five years from the entry of judgment.

Form—8 Cal. 512; 28 Cal. 156; generally, sec. 685; action
warrant, 16 Cal. 372.

Findings—on void judgment, 49 Cal. 266.

Form—684a; generally, sec. 681 *et seq.*

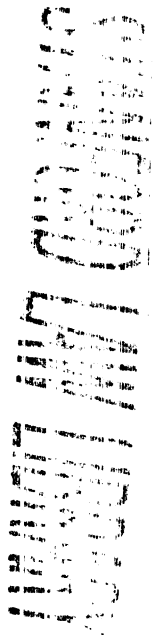
Execution must be directed to the sheriff or
constable of the county, and must be subscribed by
the justice, and bear date the day of its delivery to the
sheriff or constable, and intelligibly refer to the judgment, by
the names of the parties, and the name of the justice
for whom, and of the county and the township
in which rendered, and the time when, it was rendered; the
amount, if it be for money; and, if less than
the full amount, the true amount due thereon. It must
in all cases, similar directions to the sheriff or
constable be required by the provisions of title nine,
of the Code, in an execution to the sheriff.

Form—681 *et seq.*

Form—see sec. 843a; 17 Cal. 294.

Execution may, at the request of the judgment creditor,
be renewed before the expiration of the five years from the
return thereof, by the word "renewed" written
on the date thereof, and subscribed by the justice,
and the renewal has the effect of an original issue,
and may be renewed as often as necessary. If an execution
is returned unsatisfied, another may be afterward

Execution may be returned to the sheriff or constable to whom the execution
was returned, and he may execute the same in the same manner as



the sheriff is required by the provisions of title nine, two, of this Code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of a sheriff.

Executes the writ—compare, sec. 691 *et seq.*: and generally, see sec. 698 *et seq.*

§ 905. The sections of this Code, from seven hundred and fourteen to seven hundred and twenty-one, both inclusive, are applicable to Justices' Courts, the word "constable" being substituted, to that end, for the word "sheriff," and the word "justice" for the word "judge."
Proceedings supplementary to execution—47 Cal. 131; sec. 714

CHAPTER X.

CONTEMPTS IN JUSTICES' COURTS.

Attempts a justice may punish for. Proceedings for contempt. Punishments for contempts. Conviction must be entered in the docket.

Justice may punish as for contempt, persons following acts, and no other:

1. Contemptuous, or insolent behavior to the justice while holding the court, tending to interrupt the course of a trial or other judicial proceeding

2. Disorderly conduct, or violent behavior in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the course of a trial or other judicial proceeding

3. Obstruction or resistance to the execution of a legal process, made or issued by him; 4. Failure to answer as a witness; 5. Failure to bring any person or property in the custody of an officer under the authority of an order or process of the court held by him.

Generally, sec. 1209 et seq.

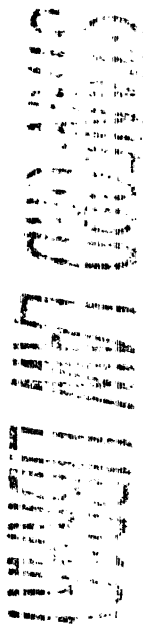
For judicial officers, powers of—sec. 128 and notes, secs. 129-131.

When a contempt is committed in the immediate presence of the justice, it may be punished summarily; to that end an order must be made by the justice, as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, he be punished as therein prescribed.

1211.

When the contempt is not committed in the immediate presence of the justice, a warrant of arrest may be issued by such justice, on which the person may be arrested and brought before the justice to answer. When an opportunity to be heard in his defense is afforded.

PROC.—36.



fense, or excuse, must be given. The justice may, thereupon, discharge him, or may convict him of the offense.

Compare—sec. 1211; sec. 1212 *et seq.*

§ 909. A justice may punish for contempts by fine, imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

One day's imprisonment—but see sec. 1219; 47 Cal. 131.

§ 910. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket.

CHAPTER XI.

DOCKETS OF JUSTICES.

at to contain.
 rein primary evidence of the facts.
 o the docket must be kept.
 ust be delivered by justice to his successor, or to
 lerk.
 s when office becomes vacant, and before a succes-
 pointed.

ry justice must keep a book, denominated
 a which he must enter:

of every action or proceeding;
 t of the action or proceeding; and if a sum
 claimed, the amount thereof;
 of the summons, and the time of its return;
 er to arrest the defendant be made, or
 attachment be issued, a statement of the

when the parties, or either of them, appear,
 appearance, if default be made; a minute of
 nd motions; if in writing, referring to them;
 ing, a concise statement of the material
 eadings;

ournment, stating on whose application
 ne;

nd for a trial by jury, when the same is
 whom made, the order for the jury, and
 nted for the return of the jury and for the

s of the jurors who appear and are sworn,
 s of all witnesses sworn, and at whose re-

ct of the jury, and when received; if the
 and are discharged, the fact of such dis-
 discharge;

uent of the court, specifying the costs in-
 e time when rendered;

ing of the execution, when issued and to
 ewals thereof, if any, and when made, and
 any money paid to the justice, when and

ipt of a notice of appeal, if any be given,

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and of the appeal bond, if any be filed. [In effect J 1st, 1874.]

Docket in cities and counties—sec. 93.

Residence of defendant—see sec. 832n.

Entries in docket—subd. 3. *Return of summons*, 10 Cal. 93; 15 296, subd. 9: judgment, 41 Cal. 232.

§ 912. The several particulars of the last section specified must be entered under the title of the action to which they relate, and (unless otherwise in this title provided) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are *prima facie* evidence of the facts so stated. [In effect March 26th, 1880.]

Prima facie evidence—sec. 1833; justices' docket as, 32 Cal. 49; admissibility of parol evidence, 34 Cal. 321.

§ 913. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index in the alphabetical order of the first letter of the family name.

§ 914. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well as those of his predecessors, or any other which may be in his custody to be kept as public records.

§ 915. If the office of a justice become vacant by death or removal from the township or city, or otherwise, before his successor is elected and qualified, the dockets and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice. If there is no other justice in the township, then the dockets and papers of such justice must be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice.

§ 916. Any justice with whom the docket of his predecessor or of another justice is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, a justice into whose hands the docket of a justice formerly acting as such within the same territory may come,

es of this section, considered the successor
r justice.

justice elected to fill a vacancy is the suc-
justice whose office became vacant before
of a full term. When a full term expires,
nother person elected to take office in the
or city, from that time is the successor.

n two or more justices are equally entitled,
t section, to be deemed the successors in
justice, a judge of the Superior Court must,
e subscribed by him and filed in the office
clerk, designate which justice is the suc-
tice going out of office, or whose office has
t. [In effect March 26th, 1880.]

[Faint, illegible text, possibly bleed-through or a stamp, consisting of several lines of characters and numbers.]

CHAPTER XII.

GENERAL PROVISIONS RELATING TO
JUSTICES' COURTS.

- § 919. Justices may issue subpoenas and final process to any part of county.
- § 920. Blanks must be filled in all papers issued by a justice, except subpoenas.
- § 921. Justices to receive all moneys collected and pay same to parties.
- § 922. In case of disability of justice, another justice may attend in his behalf.
- § 923. Justices may require security for costs.
- § 924. Who entitled to costs.
- § 925. What provisions of Code applicable to Justices' Courts.

§ 919. Justices of the peace may issue subpoenas on any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

Final process—to any part of the county, secs. 94, 106.

§ 920. The summons, execution, and every other paper made or issued by a justice, except a subpoena, must be issued without a blank left to be filled by another, or otherwise it is void.

§ 921. Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued from their courts respectively, and must pay the same, and all moneys paid to them in their official capacity, over to the parties entitled or authorized to receive them, without delay. [In effect March 26th, 1880.]

§ 922. In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons, or at the time appointed for a trial, another justice of the same township or city may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

ces may, in all cases, require a deposit of undertaking, as security for costs of court, a summons.

fees—sec. 91.

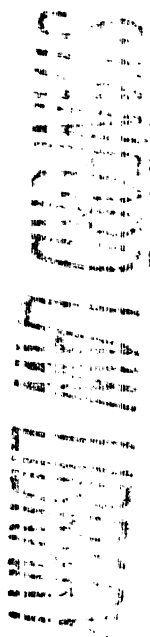
prevailing party in Justices' Courts is entitled of the action, and also of any proceedings in aid of an execution, issued upon any order therein. [In effect July 1st, 1874.]

Justices' Courts being courts of peculiar jurisdiction, only those provisions of this Code of their nature, applicable to the organization, course of proceedings in Justices' Courts, or otherwise made applicable by special provisions in this Code, are applicable to Justices' Courts and the proceedings therein.

United States jurisdiction—secs. 112-114 and notes.

Applicable—47 Cal. 131.

In all civil cases arising in Justices' Courts, an undertaking is required as prescribed in this Code. The plaintiff or defendant may deposit with said court money in United States gold coin equal to the amount required by the said undertaking, which money shall be taken as security in place of the undertaking. [Approved February 25th, 1878.]





TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN
POLICE COURTS.

- § 929. How commenced.
- 930. Summons must issue on filing complaint.
- 931. Defendant may plead orally or in writing.
- 932. Trial by jury, when defendant is entitled to.
- § 933. Proceedings to be conducted as in Justices' Courts.

§ 929. Civil actions in Police Courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint must be verified by the oath of the party complaining, or of his attorney or agent.

§ 930. Immediately after filing the complaint, a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of issuing.

§ 931. On the return of the summons the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried, unless, for good cause shown, an adjournment is granted.

§ 932. In all actions for violation of an ordinance where the fine, forfeiture, or penalty imposed by the ordinance is less than fifty dollars, the trial must be by the court. In actions where the fine, forfeiture, or penalty imposed by the ordinance is over fifty dollars, the defendant is entitled to a trial by jury.

§ 933. All proceedings in civil actions in Police Courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in Justice Courts.

Police court proceedings—no jurisdiction where legality of license questioned, 51 Cal. 499: civil proceedings in Justices' Courts, secs. 925.

TITLE XIII.

Appeals in Civil Actions.

- I. Appeals in general.
- II. Appeals from District Courts.
- III. Appeals from County Courts.
- IV. Appeals from Probate Courts.
- V. Appeals to County Courts.

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CHAPTER I.

APPEALS IN GENERAL.

- § 936. Judgment and orders may be reviewed.
- § 937. Orders made out of court, without notice, may be reviewed by the judge.
- § 938. Party aggrieved may appeal. Names of parties.
- § 939. Within what time appeal may be taken.
- § 940. Appeal, how taken.
- § 941. Appellant must file undertaking within five days.
- § 942. Undertaking on appeal from a money judgment.
- § 943. Appeal from a judgment for delivery of documents.
- § 944. Appeal from judgment directing execution of a conveyance.
- § 945. Undertaking on appeal concerning real property.
- § 946. Stay of proceedings. The security on appeal may be limited in the case of an execution, etc.
- § 947. Undertaking may be in one instrument or several.
- § 948. Justification of sureties on undertaking on appeal.
- § 949. Undertakings in cases not specified.
- § 950. What papers to be used on an appeal from the judgment.
- § 951. What papers used on appeals from orders, except orders granting or refusing new trials.
- § 952. What papers to be used on an appeal from an order granting or refusing a new trial.
- § 953. Copies and undertakings, how certified.
- § 954. When appeal may be dismissed. When not.
- § 955. Effect of dismissal.
- § 956. What may be reviewed on appeal from judgment.
- § 957. Remedial powers of an appellate court.
- § 958. On judgment on appeal, remittitur must be certified to clerk of the court below.
- § 959. Provisions of this chapter not applicable to appeals to County Courts.

§ 936. A judgment or order in a civil action, except when expressly made final by this Code, may be reviewed as prescribed in this title, and not otherwise.

Judgments and orders—appeal from, sec. 939 and notes.

Not otherwise—8 Cal. 297; 24 Cal. 334; *McLaughlin v. Dougherty*, 4 April 7th, 1880, 5 Pac. C. L. J. 330.

§ 937. An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

Vacating or modifying order—made without notice, 9 Cal. 19; Cal. 440; 46 Cal. 31: orders generally, sec. 1003 *et seq.*

§ 938. Any party aggrieved may appeal in the case prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent.

Any party aggrieved—any party, 2 Cal. 87; 38 Cal. 640; 45 Cal. 87; 53 Cal. 742; aggrieved, 6 Cal. 668; 8 Cal. 306; 10 Cal. 389; 12 Cal. 191; 17 Cal. 250; 21 Cal. 456; 23 Cal. 636; 28 Cal. 127; 38 Cal. 679; 53 Cal. 742.

Adverse party—38 Cal. 637; 53 Cal. 742.

Death of party—as affecting appeal, 5 Cal. 248; sec. 58a; sec. 336 and notes.

§ 939. An appeal may be taken:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment; but an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment;

2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment;

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment, and from an interlocutory judgment in actions for partition of real property, and from an order confirming, changing, modifying or setting aside the report in whole or in part, of the referees in actions for partition of real property, in the cases mentioned in the provisions in section seven hundred and sixty three of this Code, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court or filed with the clerk. [In effect April 12th, 1880.]

Appeals—to Supreme Court, secs. 963-966; to Superior Court, secs. 974-980.

Exceptions—need of, secs. 646, 956, and notes.

Bill of review—12 Cal. 99; 34 Cal. 76; 41 Cal. 320.

SUBDIVISION 1. Final judgment—Broad, too, 36 Cal. 156; 41 Cal. 133; consent, by, 42 Cal. 518; constitutes, what, see Definition: death of party after verdict, 50 Cal. 40; default, by, 1 Cal. 94, 416; 6 Cal. 83; 9 Cal. 616; 16 Cal. 65; 22 Cal. 463, 635; 34 Cal. 167; and as to appellate supervision over, see 10 Cal. 444; 24 Cal. 210; 34 Cal. 167; 39 Cal. 502; definition, sec. 577; 1 Cal. 24, 134; 9 Cal. 616; 16 Cal. 145; 18 Cal. 625; 21 Cal. 151, 165; 28 Cal. 86; 33 Cal. 474; 39 Cal. 559, 582; 46 Cal. 204; and see Preston v. Hearst, March 16th, 1880, 5 Pac. C. L. J. 128; demurrer on, 3 Cal. 56; 14 Cal. 28; and as to waiver, see sec. 472a; dismissal of, 18 Cal. 625; 21 Cal. 151; 30 Cal. 444; intervenor, against, 38 Cal. 610; irregular, correction or modification of, 5 Cal. 247; 41 Cal. 278; new trial, order refusing, and judgment, double appeal, 8 Cal. 637; 10 Cal. 480; 13 Cal. 203; 25 Cal. 154; 29 Cal. 343; after order granting, appeal from judgment, 33 Cal. 407; nonsuit, 6 Cal. 668; 13 Cal. 42; 22 Cal. 456; partition in, 30 Cal. 11; trust funds, decree as to, not final, 52 Cal. 414.

Action—controversy submitted without, sec. 1140: defined, see

Special proceeding, in—7 Cal. 175; 9 Cal. 107; 18 Cal. 30; 24 Cal. 26 Cal. 447; 29 Cal. 112; 37 Cal. 15; 38 Cal. 286; 42 Cal. 125; 52 Cal. 62

Within one year—38 Cal. 671; 47 Cal. 18; 49 Cal. 126; Douglass v. Fulda, No. 6,115, Feb. 9th, 1880, 5 Pac. C. L. J. 18: beginning of period, see next note: not prolonged, when, 42 Cal. 27: Probate Court appeal, sixty days only, sec. 1715.

Entry of judgment—after, 49 Cal. 126; McLaughlin v. Doherty, 7th, 1880, 5 Pac. C. L. J. 330; Thomas v. Anderson, May 26th, 1880, C. L. J. 415: before Code, from rendition, 28 Cal. 416; 31 Cal. 207; 159; 35 Cal. 216; 36 Cal. 249; 38 Cal. 423; 42 Cal. 387; 45 Cal. 64.

Insufficiency of evidence—time for appeal from, 49 Cal. 105.

SUBDIVISION 2. Judgment rendered on appeal—time for appeal from, 20 Cal. 141; 42 Cal. 110.

SUBDIVISION 3. Granting or refusing new trial, appeal order—generally, see subd. 1^a, under FINAL JUDGMENT; 29 Cal. granting, 1 Cal. 378; 13 Cal. 302; 44 Cal. 284: refusing, 15 Cal. 42, 3 Cal. 167; 35 Cal. 216; 40 Cal. 105; 43 Cal. 482; 45 Cal. 319; 47 Cal. 1 Cal. 646: time for appeal, see SIXTY DAYS, note, *infra*. Injunction appeal from order on—granting, 17 Cal. 260; 33 Cal. 390; Colburn Gray, March 4th, 1880, 5 Pac. C. L. J. 71: by county judge, former Cal. 449: refusing, 45 Cal. 244.

Attachment—order as to dissolution of, before Code, no appeal Cal. 447; 29 Cal. 362: generally, see sec. 558.

Change of venue—order as to, generally, see sec. 397: formerly directly appealable, 6 Cal. 440; 7 Cal. 117.

Special order after final judgment—appeal from, 8 Cal. 52, 13 Cal. 245; 30 Cal. 530; 35 Cal. 698; 41 Cal. 298, 439; Calderwood v. Peck, 42 Cal. 110; 52 Cal. 75; 53 Cal. 31; but see 49 Cal. 116.

Partition—interlocutory judgment in, 53 Cal. 24; Miller v. Smith, Feb. 17th, 1880, 5 Pac. C. L. J. 11: before 1864, no appeal, 30 Cal. 1 Cal. 207: generally, see sec. 763 and notes: order on report of referee, sec. 766.

Other orders—how and when reviewed, sec. 956 and notes.

Non-appealable orders—Reviewed only on appeal from judgment, sec. 956 and notes: commission for testimony, refusing, 7 Cal. costs, on relaxation of, before entry of judgment, 27 Cal. 685; 28 Cal. 105; 41 Cal. 441: default, entering, 23 Cal. 636: demurrer on, 4 Cal. 30 Cal. 529; 35 Cal. 289; 36 Cal. 112; 38 Cal. 567; 39 Cal. 145, 292; Ashlin v. Olmstead, April 21st, 1880, 5 Pac. C. L. J. 310: dismissal, of cross-petitions, 39 Cal. 145; 53 Cal. 394: vacating, as to, 32 Cal. 492; 35 Cal. 289; but see SPECIAL ORDER AFTER FINAL JUDGMENT, note, *supra*: interlocutory, except as enumerated in sec. 939, subd. 3, see 10 Cal. 503, 527: trial, on motions as to statements, etc., formerly so held, 10 Cal. 50 Cal. 192; 31 Cal. 365; 32 Cal. 73, 159, 304: but now see 42 Cal. 110, and SPECIAL ORDER AFTER FINAL JUDGMENT, note, *supra*: party, adding, 4 Cal. 375: referee's report of testimony on, 6 Cal. 84; 10 Cal. 527; 31 Cal. striking out pleadings, 36 Cal. 112. Not reviewable, account of executor, refusing to open, 53 Cal. 631: contempt, 42 Cal. 275, and see amendments in 36 Cal. 542: but *contra*, 7 Cal. 175; 9 Cal. 107: continuing, refusing, 46 Cal. 545: findings, 43 Cal. 482: receiver, appointing by judgment, 53 Cal. 495: reference in partition, vacating order of, 35 Cal. 549: but see sec. 939, subd. 3, and note on PARTITION, *supra*: stay proceedings, before judgment, 21 Cal. 419: transfer of cause to United States Court, refusing, 17 Cal. 517; 19 Cal. 124: vacate previous appealable order, on motion to, 43 Cal. 482: writ of assistance, order granting, when, 18 Cal. 141.

Thirty days—22 Cal. 650; 30 Cal. 11, 290; 31 Cal. 207; 35 Cal. 216; 36 Cal. 282; 43 Cal. 482, 625, 636; 51 Cal. 417; 53 Cal. 620.

§ 940. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing. [In effect July 1st, 1880.]

Appeal, steps of—before Code, 8 Cal. 133, 340; 9 Cal. 641; 10 Cal. 31.

Notice of appeal—*Requisites*, 24 Cal. 364; 29 Cal. 224; 32 Cal. 160; 33 Cal. 289; 40 Cal. 154. *To whom given*, 33 Cal. 637. *Filing and serving order immaterial*, but both same day, since Code, 46 Cal. 650; 48 Cal. 561; previously otherwise, 10 Cal. 186; 42 Cal. 402; before Code, prior service improper, 10 Cal. 31; 24 Cal. 94, 229; 26 Cal. 282; 30 Cal. 527; 32 Cal. 475; 33 Cal. 317; 34 Cal. 518; 42 Cal. 278. *Service, on attorney*, 7 Cal. 244; 36 Cal. 184; 39 Cal. 150; and generally, see sec. 1010 *et seq.*: formerly none in probate appeals, 34 Cal. 686; but see sec. 1714. *Given too late, effect on appeal*, 22 Cal. 650; 60 Cal. 94. *Stipulation as to filing*, 29 Cal. 460.

Undertaking on appeal—*Requirements of*, sec. 941, and notes. *Unnecessary, when*, secs. 965, 1058. *Within five days*, 15 Cal. 333, 336; 42 Cal. 271; and not before notice of appeal given, 10 Cal. 480; 16 Cal. 423; 19 Cal. 77; 24 Cal. 609; 42 Cal. 275; 46 Cal. 650; within time limited for appeal, 51 Cal. 417. *Ineffectual appeal, not to be dismissed*, 52 Cal. 325. *Exception to sureties, time for*, sec. 643 and notes.

§ 941. The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

Undertaking on appeal—*Filing, time for*, sec. 940 and note; and see sec. 1064; 15 Cal. 31; proof of, 8 Cal. 130. *Sufficiency of*, sec. 954; 5 Cal. 71; 7 Cal. 244; 9 Cal. 33; 10 Cal. 185; 13 Cal. 502, 606; 15 Cal. 31; 18 Cal. 402; 21 Cal. 512; 23 Cal. 136, 526; 42 Cal. 32. *Liability on*, 9 Cal. 273; 10 Cal. 517; 13 Cal. 353; 16 Cal. 69; 23 Cal. 159, 268; 29 Cal. 138; 33 Cal. 161; 38 Cal. 596; 48 Cal. 453; *Crane v. Weymouth*, March 31st, 1880, 5 Pac. O. L. J. 315. *Sureties, paying judgment, sec. 1059*; 53 Cal. 616; justification of, sec. 943 and note. *Suit by assignee*, 6 Cal. 81.

Deposit with clerk—sec. 943, also secs. 573, 2104.

Undertakings generally—*Liability, attachment*, 13 Cal. 553; 44 Cal. 168; criminal case, S. F. v. Randall, March 23rd, 1880, 5 Pac. C. L. J. 194; executor, 29 Cal. 98; injunction, 3 Cal. 218; 4 Cal. 88; 9 Cal. 285; 10 Cal. 353, 390; 13 Cal. 535, 588; 25 Cal. 170; 28 Cal. 11; law not required by, 20 Cal. 528; parties suing, 2 Cal. 562; 7 Cal. 551; 9 Cal. 235. *Sureties, justification of*, 18 Cal. 121; liability of, Civil Code, sec. 2836; 17 Cal. 506; 28 Cal. 535; qualification, sec. 1058; subrogation, sec. 709.

CODE CIV. PROC.—29.

§ 942. If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and the damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant do not make such payment within thirty days after the filing of the remittitur from the Supreme Court in the case from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not swear in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment be entered against the sureties shall be for such amount only as in their affidavits they may state that they severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated. When a judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency. [In effect July 1st, 1880.]

Undertaking to stay execution—10 Cal. 335; 13 Cal. 502; 15 Cal. 25 Cal. 337; 40 Cal. 278; 49 Cal. 72, 351; Hill v. Finnigan, April 6th, 5 Pac. C. L. J. 301.

Judgment affirmed—or appeal dismissed, 6 Cal. 175; 15 Cal. 327; Cal. 138.

Specified kind of money—sec. 667 and notes.

§ 943. If the judgment or order appealed from, direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of a sheriff or officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appella

two sureties, and in such amount as the judge thereof, may direct, to the effect that they will obey the order of the appellate court, &c. [In effect March 9th, 1880.]

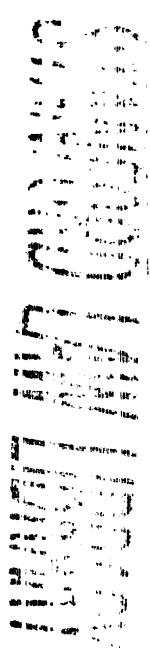
sec. 941.

The judgment or order appealed from direct or indirect of a conveyance or other instrument, the execution of which judgment or order cannot be stayed by the appellant, until the instrument is executed and deposited with the clerk of the court with whom the judgment or order is entered, the execution of the judgment or order is not stayed by the appeal.

The judgment or order appealed from direct or indirect of the delivery of possession of real property, the execution of which judgment or order cannot be stayed, unless a written instrument is executed on the part of the appellant, to the effect that during the pendency of the appeal, he will not suffer the property to be committed, any waste thereon, or the judgment be affirmed, or the appeal discontinued, until he has paid the value of the use and occupation of the property from the time of the appeal until the decision thereof, pursuant to the judgment or order, or the sum to be fixed by the judge of the court in which the judgment was rendered or order made, which sum must be specified in the undertaking. If the judgment is for the sale of mortgaged premises, and there is a deficiency arising upon the sale, the appellant must also provide for the payment of such deficiency.

Delivery of possession of—21 Cal. 233; England v. England, 29 Cal. 11; 38 Cal. 600; undertaking, sec. 941. See also sec. 945, 746.

Whenever an appeal is perfected, as provided in the sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, or upon the levy property which has been levied upon in execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the judgment and not affected by the order appealed from. And the court below may, in its discretion, with or without security, continue the proceedings with or limit the security required by this chapter. If the appellant is an executor, administrator, or other person acting in another's right, the proceedings do not continue in force an attachment



unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after the entry of the order appealed from, such appeal be perfected. [In effect July 1st, 1874.]

Stay of proceedings—sec. 949*n*; 7 Cal. 132; 47 Cal. 584; 52 Cal. 75.

Levy, release of—not before Code, 43 Cal. 72.

Security of executor, etc.—see sec. 966.

§ 947. The undertakings prescribed by sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-four may be in one instrument or several, at the option of the appellant.

Undertakings—sec. 941, notes.

§ 948. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before the judge of the court below, or county clerk, upon five days notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent. [In effect March 9th, 1880.]

Justification of sureties—see sec. 495; 1 Cal. 199; 32 Cal. 373; notes of, 10 Cal. 480; 15 Cal. 361; effect of failure, 10 Cal. 183, 480; 17 Cal. 52; Cal. 447; *Hill v. Finnigan*, March 13th, 1880, 5 Pac. C. L. J. 122; 1 April 6th, 1880, 5 Pac. C. L. J. 301; before county judge, prior to act of 1880, 18 Cal. 668; 21 Cal. 512; waiver, 32 Cal. 49.

§ 949. In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfection of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty

proceedings in the court below upon the judgment appealed from, except where it directs the sale of the property; in which case the court below orders the property to be sold and the proceeds therefrom to abide the judgment of the appellate court, except also, where it adjudges the defendant liable for trespassing, or intruding into, or unlawfully holding, civil or military, within this State. And where the order grants, or refuses to grant, a continuance of trial of an action. [In effect February

1874—7 Cal. 132; 19 Cal. 118; 24 Cal. 569; 25 Cal. 337;

On appeal from a final judgment, the appellant must file with the court with a copy of the notice of appeal, the judgment roll, and of any bill of exceptions in the case, upon which the appellant relies. The appellant may also use on motion for a new trial, or settled bill of exceptions, when the motion is made before the court, as provided in section six hundred and forty-one, or any bill of exceptions settled, or any motion for a new trial, may be made on appeal from a final judgment equally as upon the order granting or refusing the new trial. [In effect July 1st, 1874.]

Appeal from judgment—53 Cal. 281; Welch v. Allen, 8 Cal. 340; 10 Cal. 490; 29 Cal. 450; 35 Cal. 1, sec. 670 and notes; 47 Cal. 604; 53 Cal. 251; excepted—Cal. 54; 32 Cal. 91; 47 Cal. 640, 643; 50 Cal. 508, 524; 51 Cal. 2.

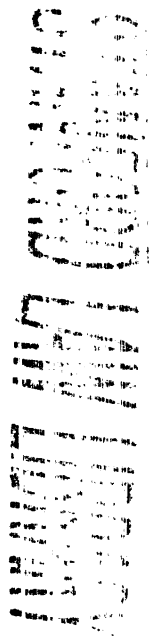
Generally, sec. 129n; 8 Cal. 340; 10 Cal. 491; 24 Cal. 267; 26 Cal. 29; 28 Cal. 555; 29 Cal. 461, 486; 31 Cal. 107, 657; 34 Cal. 23, 56; 35 Cal. 129, 521, 580; 39 Cal. 93; 43 Cal. 177, 458, 482; 47 Cal. 49; 49 Cal. 340; authentication of, sec. 953 and notes—sec. 952 and notes, *supra*.

Appeal from a judgment rendered on an appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below. [In effect July 1st, 1874.]

Appeal from judgment—compare sec. 950n.

Appeal from orders—25 Cal. 534; 27 Cal. 635; 28 Cal. 649; 29 Cal. 167.

On appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of papers used on the hearing in the court below.



from, and of the papers designated in section six hundred and sixty-one of this Code. [In effect July 1st, 1874.]

Papers on appeal—generally, see secs. 950, 951.

Order as to new trial—record on appeal from, 23 Cal. 540; 25 Cal. 584; 23 Cal. 58; 29 Cal. 612; 45 Cal. 174; *Thompson v. Patterson*, 23rd, 1880, 5 Pac. C. L. J. 388.

§ 953. The copies provided for in the last three sections must be certified to be correct by the clerk or attorneys, and must be accompanied with a certificate from the clerk or attorneys that an undertaking on appeal in due form, has been properly filed, or a stipulation of the parties waiving an undertaking. [In effect July 1st, 1874.]

Certificate—42 Cal. 629; 43 Cal. 25, 54; 51 Cal. 420; *Winder v. Henc*, March 3rd, 1880, 5 Pac. C. L. J. 67; undertaking filed, 8 Cal. 340; 23 Cal. 58; 52 Cal. 644.

Stipulation—48 Cal. 83; generally, 283n.

Transcript—sec. 950n.

Review on appeal—sec. 53n: when certiorari proper mode, 424.

§ 954. If the appellant fails to furnish the required papers, the appeal may be dismissed; but no appeal may be dismissed for insufficiency of the undertaking therefor, if a good and sufficient undertaking, approved by a justice of the Supreme Court, be filed in the Supreme Court before the hearing upon motion to dismiss the appeal.

Requisite papers not furnished—*Dismissal for*, sec. 129n; 2 Cal. 150, 162; 5 Cal. 155; 25 Cal. 534; 33 Cal. 572; 47 Cal. 414; 50 Cal. 94; *Pe* v. Center, March 1st, 1880, 5 Pac. C. L. J. 40; *Spinetti v. Brignard*, April 7th, 1880, 5 Pac. C. L. J. 329; motion, 8 Cal. 347; 38 Cal. 637; 47 Cal. 606; 48 Cal. 151; restoration of appeal, 2 Cal. 162; 21 Cal. 512; 25 Cal. 512; *Substituted undertaking*, 21 Cal. 512; 23 Cal. 526; 32 Cal. 375; 52 Cal. 644.

§ 955. The dismissal of an appeal is in effect an affirmation of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

Effect of dismissal—15 Cal. 324; 16 Cal. 207; 40 Cal. 101, 278; *Spinetti v. Brignardello*, April 7th, 1880, 5 Pac. C. L. J. 329.

Control over judgment on appeal—sec. 53n.

§ 956. Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits of the case, and necessarily affects the judgment, except a decision or order from which an appeal might have been taken. [In effect April 3rd, 1876—in effect June 1st, 1876.]

Review on appeal—sec. 53n; *Ashley v. Olmstead*, April 21st, 1880, 5 Pac. C. L. J. 310; *Thompson v. Patterson*, April 23rd, 1880, 5 Pac. C. L. J. 388; *Freeman v. Campbell*, May 20th, 1880, 5 Pac. C. L. J. 533.

Intermediate orders—*Non-appealable*, see under sec. 939n: emb

§ 959**APPEALS IN GENERAL.**

Cal. 414; 33 Cal. 484; 41 Cal. 588; 45 Cal. 180, 617; recalling, 22 Cal. 52; 36 Cal. 329; 43 Cal. 178; 46 Cal. 640; 52 Cal. 473.

§ 959. The provisions of this chapter do not apply to appeals to Superior Courts. [In effect March 9th, 1880.]
Appeals to Superior Courts—secs. 974-980.

550: refusing payment of claim, 49 Cal. 152. Non-appealable orders—45 Cal. 257; 50 Cal. 293; 51 Cal. 563; 53 Cal. 631: Estate of Montgomery, May 27th, 1880, 5 Pac. C. L. J. 478.

§ 964. The foregoing section does not apply in cases appealed from Justices', Police, or other inferior courts, except cases of forcible entry and detainer, and cases involving the title or possession of real property, or legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or value of the property in controversy, amounts to three hundred dollars.

Appeals to Superior Court—sec. 974 *et seq.*

Forcible entry and detainer—concurrent jurisdiction of Justices' Courts, sec. 113, subd. 1.

§ 965. When an executor, administrator, or guardian who has given an official bond, appeals from a judgment or order of the Superior Court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking.

Undertaking—on appeal, and generally, sec. 941, notes.

Probate appeals—sec. 963, subd. 3 and notes.

§ 966. When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the Court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

Appointment of executor, etc.—appeal from, sec. 963, subd. 3.

Restitution on reversal, etc.—sec. 957.

CHAPTER III.

APPEALS TO SUPERIOR COURTS.

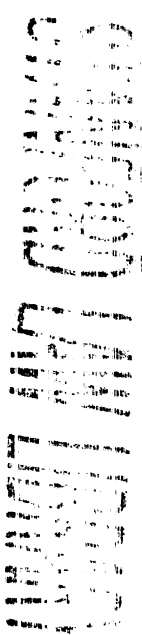
appeal from judgment of Justice's or Police Court.
 appeal on questions of law statement.
 appeal on questions of fact, or law and fact.
 transmission of papers to appellate court.
 undertaking on appeal.
 order of proceedings on filing undertaking.
 orders of Superior Court on appeal.

A party dissatisfied with a judgment rendered in a Police or Justice's Court, may appeal to the Superior Court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, and whether the appeal is taken from questions of law or fact, or both.

Appeal—sufficiency, 5 Cal. 124; 23 Cal. 136; service on appeal, sec. 1015; 6 Cal. 245; 7 Cal. 245, and compare sec. 1016; 16 Cal. 368; appeal, when proper remedy, 50 Cal. 100.

When a party appeals to the Superior Court on questions of law alone, he must, within ten days from the rendition of the judgment, prepare a statement of the case and serve it on the justice or judge. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as is necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement has been filed by the adverse party, if dissatisfied with the statement, he may file amendments. The proposed statement and amendments must be settled by the justice or judge; if not settled, the original statement stands. The statement thus adopted, or as settled by the justice or judge, with a copy of the docket of the case, and all motions filed with him by the appellant, and the notice of appeal, may be taken to the hearing of the appeal before the Superior Court.

Statement—on appeal, compare sec. 650 and notes.



§§ 976-8 APPEALS TO SUPERIOR COURTS.

§ 976. When a party appeals to the Superior Court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the Superior Court. [In effect March 26th, 1880.]

Tried anew—5 Cal. 53, 75; 10 Cal. 19; 11 Cal. 328: conduct of sec. 980.

§ 977. Upon receiving the notice of appeal, and the payment of the fees of the justice or judge, and filing an undertaking as required in the next section, and a settlement or adoption of statement, if any, the justice or judge must, within five days, transmit to the clerk of the Superior Court, if the appeal be on questions of fact alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; or, if the appeal be on questions of fact, or of law and fact, a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the case, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the Superior Court by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney. In the Superior Court, either party may have the benefit of all legal objections made in the Justice's or Police Court. [In effect March 26th, 1880.]

Payment of fees—5 Cal. 89; 6 Cal. 287; 9 Cal. 571. Transmitting record—9 Cal. 17.

§ 978. An appeal from a Justice's or Police Court is not effectual for any purpose, unless an undertaking is filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the Superior Court. When the action is for the recovery of or to enforce or foreclose a lien on specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the

as may be necessary to pay the same. [In effect March 26th, 1880.]

Stay of proceedings—sec. 946n.

§ 980. Upon an appeal heard upon a statement of case, the Superior Court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew on appeal, the trial must be conducted in all respects as other trials in the Superior Court. The provisions of this Code as to changing the place of trial, and all the provisions as to trials in the Superior Court, are applicable to trials on appeal in the Superior Court. In case of a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the Superior Court, after notice may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent. of the judgment appealed from. Judgments rendered in the Superior Court on appeal shall have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the Superior Court. [In effect March 26th, 1880.]

New trial—8 Cal. 517; 9 Cal. 211; 40 Cal. 355.

Conduct of trial—generally, sec. 607n: amendment to pleadings—Cal. 342.

Transfer from Justices' Court—17 Cal. 68; 50 Cal. 509.

Dismissal of appeal—39 Cal. 663; 40 Cal. 642.

Appeal for delay—compare sec. 957n.

CHAPTER LXXI. *

An Act to repeal chapters four and five, of title thirteen, part two, of the Code of Civil Procedure, and each and every section of said chapters four and five, relating to appeals in civil actions. [Approved April 15th, 1880.]

The People of the State of California, represented by the Senate and Assembly, do enact as follows:

§ 1. Chapters four and five, of title thirteen, of part two, of the Code of Civil Procedure, and each and every section of said chapters four and five, [§§ 969-980] are hereby repealed.

§ 2. This Act shall take effect immediately.

TITLE XIV.

Miscellaneous Provisions.

proceedings against joint debtors.
offer of the defendant to compromise.
inspection of writings.
motions and orders.
notices, and filing, and service of papers.
of costs.
general provisions.

[351]

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CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

- § 989. Parties not summoned in action on joint contract may be summoned after judgment.
- § 990. Summons in that case, what to contain, and how served.
- § 991. Affidavit to accompany summons.
- § 992. Answer, when filed and what it may contain.
- § 993. What constitute the pleadings in the case.
- § 994. Issues, how tried. Verdict, what to be.

§ 989. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in section four hundred and fourteen, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

Cognate provisions—secs. 383, 414, 579.

Bound by the judgment—48 Cal. 438: but no action on judgment Cal. 34.

§ 990. The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returned within the same time as the original summons. It is not necessary to file a new complaint.

Summons—contents, service, etc., secs. 407, 410, *et seq.*

§ 991. The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

§ 992. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except discharge from such liability by the Statute of Limitations.

Answer—sec. 437, notes, *et seq.*

§ 993. If the defendant, in his answer, deny the judgment, or set up any defense which may have arisen subsequent to the judgment, he must show cause why he should not be bound by the judgment.

the summons, with the affidavit annexed, and constitute the written allegations in the case: his liability on the obligation upon which the was recovered, a copy of the original complaint ent, the summons, with the affidavit annexed, wer, constitute such written allegations.

The issues formed may be tried as in other when the defendant denies, in his answer, any the obligation upon which the judgment was f a verdict be found against him it must be for ing the amount remaining unsatisfied on such dgment, with interest thereon.

607-645.



CHAPTER II.
OFFER OF THE DEFENDANT TO COMPROMISE

§ 997. Proceedings on offer of the defendant to compromise after brought.

§ 997. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he must file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer. [In effect July 1st, 1874.]

Before the trial—17 Cal. 582.

Offer—not an admission, sec. 2078: equivalent to tender, sec. 2074.

Cognovit as admission—6 Cal. 607.

Judgment—entered, 25 Cal. 502: by confession, sec. 1182.

Defendant's costs—28 Cal. 238.

CHAPTER III.

INSPECTION OF WRITINGS.

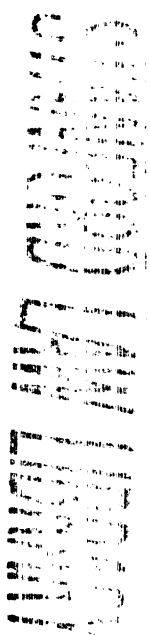
On demand inspection and copy of a book, paper, etc.

In any court in which an action is pending, or about to be commenced, the court may, upon notice, order either party to produce, within a specified time, an inspection or permission to take a copy, of entries of account, or of any document or paper in his possession or under his control, containing evidence relevant to the merits of the action, or the defense therein. If the party with the order be refused, the court may order the production of accounts of the book, or the documents, from being given in evidence, or if wanted by the party applying, may direct the jury to believe them to be such as he alleges them to be; and may also punish the party refusing for a contempt. This section is not to be construed to prevent compelling another to produce books, papers, documents, when he is examined as a witness. [Act of March 15th, 1880.]

Contempt—sec. 454.

Production of books, etc.—sec. 1985 *et seq.*: see also

sec. 1209 *et seq.*



CHAPTER IV.
MOTIONS AND ORDERS.

- § 1003. Order and motion defined.
 1004. Motions and orders, where made.
 1005. Notice of motion, at what time to be given.
 1006. Transfer of motions and orders to show cause.
 1007. Order for payment of money, how enforced.

§ 1003. Every direction of a court or judge made entered in writing, and not included in a judgment, is nominated an order. An application for an order is a motion.

Order—form of, 48 Cal. 197; vacating, sec. 937; 46 Cal. 31: mod interlocutory, 47 Cal. 70: enforcement, sec. 128, subd. 4: renewing application for, secs. 182, 183: final, effect of as estoppel, sec. 1908.

Motion—notice of, sec. 1005: heard before court commissioner 259, subd. 1.

§ 1004. Motions must be made in the county, or county, in which the action is pending. Orders made out of court may be made by the judge of the court in any part of the State. [In effect March 10th, 1880.]

Power of judge at chambers—secs. 165, 166, 176; 30 Cal. 530, 531; Cal. 239: judge in another county, 32 Cal. 568; 35 Cal. 688: court commissioner's control of *ex parte* motions, sec. 259, subd. 1.

§ 1005. When a written notice of a motion is necessary, it must be given, if the court be held in the county, or city and county, with both parties, five days before the time appointed for the hearing; otherwise ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court or a judge thereof, may prescribe a shorter time. [In effect March 10th, 1880.]

Motion, notice of—period, 22 Cal. 479; 30 Cal. 123; 35 Cal. 465: stated grounds, 10 Cal. 338: written, must be, sec. 1010; 12 Cal. 441; 24 Cal. 441: for depositions on commission, 48 Cal. 439: order made without notice, sec. 937; *Livermore v. Hodgkins*, April 26th, 1880, 5 Pac. C. L. J. 111: filing counter-affidavits, 22 Cal. 131: estoppel, 14 Cal. 667.

Service—of papers generally, sec. 1010 *et seq.*

Distance—23 Cal. 112.

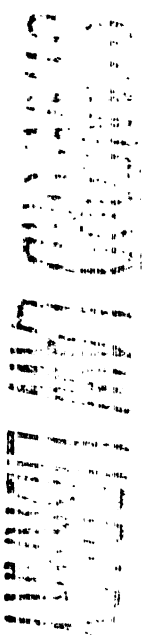
When a notice of motion is given, or an order is made returnable, before a judge out of the time fixed for the motion, or on the day of the order, the judge is unable to hear the matter may be transferred by his order to another judge, before whom it might originally have been heard.

Section—sec. 1005 and note.

Reason—need of service, 16 Cal. 90.

Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this section, the same may be enforced by execution in the same manner as if it were a judgment.

Enforcement—sec. 681 *et seq.*: contempt, sec. 1209 *et seq.*





CHAPTER V.

NOTICES, AND FILING AND SERVICE
PAPERS.

- § 1010. Notices and papers, how served.
- § 1011. When and how served.
- § 1012. Service by mail, when.
- § 1013. Service by mail, how.
- § 1014. Appearance. Notices after appearance.
- § 1015. Service on non-residents. Where a party has an attorney, service shall be on such attorney.
- § 1016. Preceding provisions not to apply to proceeding to bring into contempt.
- § 1017. Service by telegraph.

§ 1010. Notices must be in writing, and notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this Code.

§ 1011. The service may be personal, by delivering to the party or attorney on whom the service is required, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person in charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same in a closed in an envelope, into the post-office, directed to the attorney.

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelope, into the post-office, directed to such party.

Service—28 Cal. 151; 32 Cal. 475: of notice of appeal, 46 Cal. 650; acceptance of, 22 Cal. 650.

SUBDIVISION 1. On attorney—sec. 1015; 6 Cal. 55; 49 Cal. 510.

SUBDIVISION 2. On party—34 Cal. 658.

SERVING AND SERVICE OF PAPERS. §§ 1012-15

Service by mail may be made, where the person to be served is absent from his residence, and the person on whom it is to be served does not reside with him, or where he or she has their offices in different places, and there is a regular communication by mail. [Section 1012, July 1st, 1874.]

Service by mail—35 Cal. 184.

Service in different places—30 Cal. 184.

When service is made by mail, the notice or other paper to be served is to be deposited in the post-office, addressed to the person to whom it is to be served, at his office or place of business, and the postage paid. The service is complete at the time of the deposit, but if within a given time after such service a right may be exercised by the person to be served, or by the adverse party, to set aside the service, which such right may be exercised or act be done within one day for every twenty-five miles distance between the place of deposit and the place of address of the person to be served, however, not to exceed ninety days after the date of the deposit. [Section 1013, July 1st, 1874.]

Service by mail—23 Cal. 152.

Service by mail—35 Cal. 184.

When a defendant appears in an action when he answers the complaint, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance, after appearance, a defendant or his attorney is required to give notice of all subsequent proceedings in the action to the plaintiff or his attorney. But where a defendant does not appear, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.

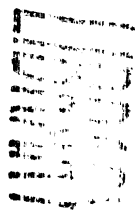
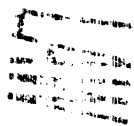
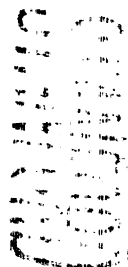
Service of answer as, 13 Cal. 568; 21 Cal. 51; 31 Cal. 346; attorney, 10 Cal. 100; notice of, 4 Cal. 305; 8 Cal. 339, 569; 27 Cal. 295; writ summons, etc., 4 Cal. 305; 44 Cal. 630; 47 Cal. 614; 50 Cal. 615; sufficiency of, 44 Cal. 157; 47 Cal. 614, and see notice of appearance generally, 14 Cal. 677, and see last subhead: waiver of appearance, 4 Cal. 416; 4 Cal. 120, 280; 14 Cal. 105; 44 Cal. 630; 45 Cal. 615; where none, 16 Cal. 160.

Service by attorney—4 Cal. 280; 13 Cal. 191; 17 Cal. 431; 21 Cal. 431; 21 Cal. 192, 439; 31 Cal. 346; 42 Cal. 148, 439; 43 Cal. 455; 44 Cal. 615.

Service in subsequent proceedings—how given, sec. 1015.

When a plaintiff or a defendant, who has no attorney, appears out of the State, and has no attorney in the action or proceeding, the service may be made on the person.

But in all cases where a party has an attorney, the service of papers, notices, and other papers, must be upon the attorney instead of the party.



§§ 1016-17 NOTICES, FILING AND SERVICE OF PAPERS

party, except of subpoenas, of writs, and other process sued in the suit, and of papers to bring him into contempt.

Attorney—authority of, sec. 283, subd. 1, note: 21 Cal. 426; 42 Cal. 426; duties of, sec. 282: disbarred, when, see secs. 287 to 299; People v. Son, June 10th, 1880, 5 Pac. C. L. J. 537.

Service, how made—sec. 1011: on attorney, 47 Cal. 644.

Exception of process and contempt—sec. 1016.

§ 1016. The foregoing provisions of this chapter do not apply to the service of a summons or other process or of any paper to bring a party into contempt.

§ 1017. Any summons, writ, or order, in any civil or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place. The telegraphic copy of such writ, or order, or paper transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner and with the same force and effect, in all respects, as if the original thereof might be delivered to him; and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it is issued, and a certified copy thereof must be preserved in the telegraph office from which it was sent. In serving it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph a description of the seal, or any mark or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S." or by the word "seal."

CHAPTER VI. OF COSTS.

tion of attorneys. Costs to parties.
 owed, of course, to the plaintiff.
 actions brought on a single cause of action can carry
 n but one.
 t's costs must be allowed, of course, in certain cases.
 en in the discretion of the court.
 several defendants are not united in interest, costs
 e served.
 appeal discretionary with the court, in certain cases.
 fees.
 nce, costs may be imposed as condition of.
 n a tender is made before suit brought.
 ction by or against an administrator, etc.
 review other than by appeal.
 and affidavit, to bill of costs.
 appeal, how claimed and recovered.
 nd costs must be included by the clerk in the judg-
 intiff is a non-resident or foreign corporation, defend-
 ay require security for costs.
 ecurity be not given, the action may be dismissed.
 n State is a party.
 n county is a party.

he measure and mode of compensation of at-
 ounselors at law is left to the agreement of ex-
 ed, of the parties; but parties to actions or
 re entitled to costs and disbursements, as
 ovided.

a of attorneys—see sec. 282_n: eminent domain, in,
 l. 102; in, as costs where series of suits, 39 Cal. 85: fore-
 726_n; sec. 1500: 5 Cal. 492: injunction bond, as dam-
 5; 25 Cal. 170; 28 Cal. 11: lien for limited, 1 Cal. 331;
 l. 93: maintenance obsolete, 22 Cal. 95: mechanics'
 195: partition, in, secs. 796, 798: receiver, for, 15 Cal.
 g heirs of estate, for, sec. 1718: retainer, 3 Cal. 108:
 of, 40 Cal. 289.

bursements—eminent domain, sec. 1255: error as to,
 l. 102: foreclosure, 5 Cal. 416, 492: married woman, 26
 les' liens, on, sec. 1195: money, action for, 29 Cal. 281:
 ment, lost, where, 28 Cal. 561: new trial, 29 Cal. 281:
 38, 796, 798, 801: percentage at San Francisco, Stats.
 l. 195; 49 Cal. 596: phonographic reporters, sec. 274:
 ings—contested wills, sec. 1332; executor, secs. 1503,
 eads, as to, sec. 1485; reference of claim, sec. 1508;
 nce, 36 Cal. 230.

sts are allowed, of course, to the plaintiff,
 ent in his favor, in the following cases:

PROC.—31.

1. In an action for the recovery of real property;
2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such value shall be determined by the jury, court, or referee by whom the action is tried;
3. In an action for the recovery of money or damages when plaintiff recovers three hundred dollars or over;
4. In a special proceeding;
5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine.

Section generally—30 Cal. 545; 37 Cal. 202.

Costs discretionary—when, secs. 1025, 1027.

SUBDIVISION 1. Real property—recovery of possession of, 30 Cal. 547; 37 Cal. 202.

SUBDIVISION 2. Personal property—value, sec. 1025; 5 Cal. 26 Cal. 309.

SUBDIVISION 3. Money or damages—sec. 1025: damages, 10 Cal. 217; 17 Cal. 336.

SUBDIVISION 4. Special proceeding—generally, secs. 1063-1822.

SUBDIVISION 5. Tax suits—53 Cal. 386.

§ 1023. When several actions are brought on bond, undertaking, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the plaintiff proceeded against in the other actions were, at the commencement of the previous action, openly within the State; but the disbursements of the plaintiff must be allowed to him in each action.

Several parties—who might have been joined as defendants, 383.

§ 1024. Costs must be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in section ten hundred and twenty-two, and in special proceedings.

Special proceedings—secs. 1063-1822.

§ 1025. In other actions than those mentioned in section ten hundred and twenty-two, costs may be allowed to the plaintiff, not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers.

hundred dollars, nor in an action to recover of personal property, when the value of the s than three hundred dollars.

ary—when, 25 Cal. 266; 28 Cal. 561; 35 Cal. 136; 39 8.

han \$300—6 Cal. 236; 17 Cal. 336.

hen there are several defendants in the ned in section ten hundred and twenty-two, interest, and making separate defenses by ers, and plaintiff fails to recover judgment e court must award costs to such of the de- ve judgment in their favor.

ome defendants—sec. 578 and note.

y of costs—by several defendants, 5 Cal. 61; joint lia- 219.

the following cases, the costs of appeal are on of the court:

ew trial is ordered;
udgment is modified.

al—meaning of term, 11 Cal. 341; of printing tran-

1. New trial ordered—13 Cal. 58; 24 Cal. 350.

2. Judgment modified—secs. 53*n*, 57; 1 Cal. 51; 2 89; 30 Cal. 458.

he fees of referees are five dollars to each for ent in the business of the reference; but the ee, in writing, upon any other rate of com- d thereupon such rate shall be allowed.

nerally, secs. 638-645.

artition—compensation of, secs. 768, 796.

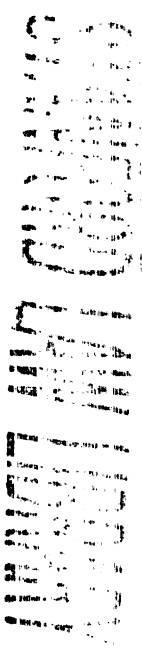
hen an application is made to a court or stpone a trial, the payment of costs occa- postponement may be imposed, in the dis- court or referee, as a condition of granting

t—generally, secs. 595, 596.

hen, in an action for the recovery of money ndant alleges in his answer that before the nt of the action, he tendered to the plaintiff out to which he was entitled, and thereupon ourt for plaintiff the amount so tendered, ation be found to be true, the plaintiff can- sts, but must pay costs to the defendant.

re section followed—25 Cal. 502.

76: plea of, when gains costs, 28 Cal. 238.



Offer to compromise—sec. 997.

Deposit in court—secs. 572-574, sec. 1024.

§ 1031. In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must by judgment be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

Costs against executor, etc.—secs. 1508, 1509; 6 Cal. 169; 33 Cal.

Trust funds—attorney's fee out of, 40 Cal. 288.

§ 1032. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in case of appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

Special proceedings—generally, secs. 1063-1822.

Decision of inferior court reviewed—secs. 1067-1110.

Costs on appeal—secs. 129n, 1027, 1034.

§ 1033. The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee, or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed, may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers. [In effect July 1874.]

Memorandum of costs—essential, 16 Cal. 403.

Items included—new trial, where, see 13 Cal. 58: short-hand reporter's fees, sec. 274: witness fees, see 41 Cal. 242.

Retaxation of costs—5 Cal. 417; 23 Cal. 286: amendment of bill of costs, sec. 473n; 3 Cal. 115; 46 Cal. 580: correcting error by appeal, Cal. 245.

1—section inapplicable to, 11 Cal. 341: generally, see

Whenever costs are awarded to a party by an order, if he claims such costs, he must, within ten days after the remittitur is filed with the clerk before such clerk a memorandum of his costs, as prescribed by the preceding section, and thereupon have an execution therefor as upon a judgment.

—sec. 1032; 14 Cal. 232; *Cohen v. Gray*, March 4th, 1871.
—sec. 958.

of costs—delivered to clerk of court below, 24 Cal.

reference—14 Cal. 232; 24 Cal. 350.

The clerk must include in the judgment entered the interest on the verdict or decision of the court from the time it was rendered or made, and the amount thereof have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, insert the same in the judgment, insert the same in the judgment for that purpose, and make a similar insertion of the costs in the copies of the judgment.

interest—30 Cal. 78.

in blank—formerly unauthorized, 16 Cal. 403.

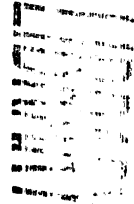
When the plaintiff in an action resides out of the state, and is a foreign corporation, security for the costs which may be awarded against such plaintiff must be required by the defendant. When required, the action must be stayed until an undertaking is executed by two or more persons, is filed with the clerk, and has the effect that they will pay such costs and interest which may be awarded against the plaintiff by judgment during the progress of the action, not exceeding the sum of one hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon the ground that the original undertaking is insufficient security, until such new or additional undertaking is executed and filed.

for foreign corporation—22 Cal. 538.

security is required—sec. 1037; 19 Cal. 77.

generally—sec. 941.

After the lapse of thirty days from the service of a writ of attachment, security is required, or of an order for new security, upon proof thereof, and that no



§§ 1038-9

OF COSTS.

undertaking as required has been filed, the court or judge may order the action to be dismissed.

Dismissal, when too late—19 Cal. 77.

§ 1038. When the State is a party, and costs awarded against it, they must be paid out of the State treasury.

No security required of State—sec. 1038.

§ 1039. When a county is a party, and costs awarded against it, they must be paid out of the county treasury.

No security required of county—sec. 1038.

CHAPTER VII.

GENERAL PROVISIONS.

rs, how supplied.
 outh the title of the action, or with defective title,
 e valid.
 e actions on the same contract, etc.
 tion of several actions into one.
 hen deemed pending.
 o determine adverse claims, and by sureties.
 y, when to be taken by the clerk.
 must keep a register of actions.
 ree referees, etc., may do any act.
 within which an act is to be done may be extended.
 gainst a sheriff for official acts.
 ay be prosecuted in the Spanish language in certain
 es.
 ing mentioned in this Code, requisites of.
 State not required to give bonds when State is a party.
 appeal substituted to rights of judgment creditor.

an original pleading or paper be lost, the
 uthorize a copy thereof to be filed and used
 original.

Cal. 381; 24 Cal. 267; 27 Cal. 423; 28 Cal. 557; 49 Cal. 263.

a affidavit, notice, or other paper, without
 e action or proceeding in which it is made
 ctive title, is as valid and effectual for any
 uly entitled, if it intelligibly refer to such
 eeding.

—3 Cal. 195.

ccessive actions may be maintained upon
 ract or transaction, whenever, after the
 a new cause of action arises therefrom.

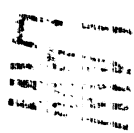
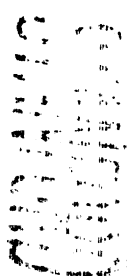
—sec. 22.

enever two or more actions are pending at
 een the same parties and in the same court,
 f action which might have been joined, the
 er the actions to be consolidated.

of actions—27 Cal. 500; 29 Cal. 307.

a action is deemed to be pending from the
 mmencement until its final determination
 r until the time for appeal has passed, un-
 ent is sooner satisfied.

ction—36 Cal. 391.



§ 1050. An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as a surety.

Preventing suit—provision not designed for, 5 Cal. 82; and see Cal. 596.

Quieting title to realty—sec. 738.

Surety's suit—24 Cal. 157.

§ 1051. On the trial of an action in a court of record if there is no short-hand reporter of the court in attendance, either party may require the clerk to take down the testimony in writing.

Clerk's powers and duties—sec. 670a.

Clerk's minutes of the trial—1 Cal. 462, 470; 2 Cal. 54, 161; 14 Cal. 81; 27 Cal. 107; 28 Cal. 174, 299; 33 Cal. 173.

§ 1052. The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

Records of the court—see secs. 668, 672, 683.

§ 1053. When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.

References and trials by referees—secs. 638-645.

§ 1054. When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or amendments thereto, or to the service of notices other than of appeal, the time allowed by this Code may be extended, upon good cause shown by the court in which the action is pending, or a judge thereof; but such extension shall not exceed thirty days without the consent of the adverse party. [In effect March 9th, 1880.]

Extension of time—17 Cal. 122; 24 Cal. 179; 27 Cal. 106, 338; 41 Cal. 515; 43 Cal. 320; 47 Cal. 86: computation of time, sec. 12 and notes: hours, days, secs. 10, 11, 13.

Thirty days—28 Cal. 238; 43 Cal. 320.

§ 1055. If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive

of his right to recover against such sureties; court may, on motion, upon notice of five days, judgment to be entered up against them for the amount recovered, including costs. [In effect April 16th, 1880.]

to be construed—against sheriff, 28 Cal. 102.

may intervene—21 Cal. 442.

Repealed. [In effect April 16th, 1880.]

In all cases where an undertaking with sureties is required by the provisions of this Code, the officer requiring the same must require the sureties to accompany the undertaking with an affidavit that they are each residents and freeholders within the State, and are each of the age and condition specified in the undertaking, over and above their just debts and liabilities, exclusive of the amount of the undertaking; but when the amount of the undertaking exceeds three thousand dollars, there are more than two sureties thereon, they must accompany their affidavits that they are severally worth more than that expressed in the undertaking, if the amount be equivalent to that of two sufficient

—defective, 2 Cal. 582; 13 Cal. 606.

—defective, curing objection to, 52 Cal. 447; each worth the value of the property, 51 Cal. 518.

—exempt from execution—sec. 690 and notes.

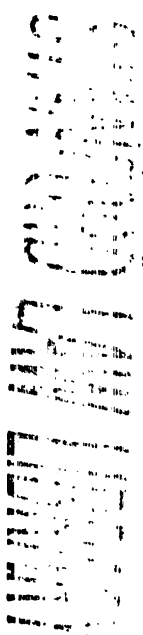
—guardians—sec. 1809.

In any civil action or proceeding wherein the State, or any officer of the State, is a party plaintiff, or defendant, or any officer thereof, or on behalf of any county, city and county, city, or town, or any officer thereof, no bond, written undertaking, or security can be required of the State, or the people thereof, or any officer thereof, or of any county, city and county, or town; but on complying with the other provisions of this Code, the State, or the people thereof, or any officer acting in his official capacity, have the same remedies, and benefits as if the bond, undertaking, or security were given and approved as required by law. [In effect April 15th, 1880.]

—at State or county—secs. 1038, 1039.

—Board of Supervisors included, 10 Cal. 344.

Whenever any surety on an undertaking on appeal is required to stay proceedings upon a money judgment, or the judgment, either with or without action,



after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same. [In effect July 1st, 1874.]

Undertaking on appeal—sec. 941a.

Subrogation of sureties—sec. 709a.

PART III.

**JUDICIAL PROCEEDINGS OF A
CIVIL NATURE.**

WRITS OF MANDATE AND PROHIBITION. §§
1067-1110.

CONTESTING ELECTIONS. §§ 1111-1127.

SUMMARY PROCEEDINGS. §§ 1132-1178.

ENFORCEMENT OF LIENS. §§ 1180-1206.

CONTEMPT. §§ 1209-1222.

VOLUNTARY DISSOLUTION OF CORPORATIONS.
§§ 1227-1223.

EMINENT DOMAIN. §§ 1237-1263.

ESCHEATED ESTATES. §§ 1269-1272.

CHANGE OF NAME. §§ 1275-1278.

ARBITRATIONS. §§ 1281-1290.

PROCEEDINGS IN PROBATE COURTS. §§ 1294-
1809.

SOLE TRADERS. §§ 1811-1821.

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PRELIMINARY PROVISIONS.

§ 1063. Parties, how designated.

§ 1064. Judgment and order same meaning as in civil actions.

§ 1063. The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant.

Plaintiff and defendant—sec. 308.

§ 1064. A judgment in a special proceeding is the determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

Judgment—definition of, sec. 577 and note.

Motion and order—*s. c.* 1003.

TITLE I.

OF WRITS OF REVIEW, MANDATE, AND PROHIBITION.

CHAP. I. Writ of review.

II. Writ of mandate.

III. Writ of prohibition.

IV. Writs of review, mandate, and prohibition may be issued and heard at chambers.

V. Rules of practice and appeals.

CHAPTER I.

WRIT OF REVIEW.

§ 1067. Writ of review defined.

§ 1068. When and by what courts granted.

§ 1069. Application for, how made.

§ 1070. The writ to be directed to the inferior tribunal, etc.

§ 1071. Contents of the writ.

§ 1072. Proceedings in inferior court may be stayed, or not.

§ 1073. Service of the writ.

§ 1074. The review under the writ, extent of.

§ 1075. A defective return of the writ may be perfected. Hearing of judgment.

§ 1076. Copy of judgment must be sent to the inferior tribunal.

§ 1077. Judgment rolls.

§ 1067. The writ of certiorari may be denominated the writ of review. [In effect July 1st, 1874.]

Writ, generally—sec. 51a.

writ of review may be granted by any Police or Justice's Court, when an inferior officer, or officer, exercising judicial functions, exceeds the jurisdiction of such tribunal, board, or commission, where there is no appeal, nor, in the judgment of the court, a plain, speedy, and adequate remedy.

Extent of review on, sec. 1074, and see EXCEEDED THE JURISDICTION, note *infra*. *Object*—to annul and not to restrain; Lamb v. Superior Court, 17th, 1880, 5 Pac. C. L. J. 140. *When proper or otherwise*, EXCEEDED THE JURISDICTION, note *infra*.

Proper court—see secs. 51n, 76, subd. 5 and notes; 7 Cal. 140; 49 Cal. 29.

Proper board or officer; existence of court implied, 53 Cal. 389.

Judicial functions—applies to municipal boards, 8 Cal. 140; 3 Cal. 208; 18 Cal. 49; 23 Cal. 302, 492; 25 Cal. 94; 51 Cal. 389; 53 Cal. 389; Lamb v. Schottler, March 17th, 1880, 5 Pac. C. L. J. 140. *Example* v. Board of Education, Oakland, March 22nd, 1880, 5 Pac. C. L. J. 140. *Ministerial act of judicial officer*, 40 Cal. 344.

Judicial jurisdiction—*Meaning of phrase*, 43 Cal. 365. *No interference*, 3 Cal. 386; 5 Cal. 476; 7 Cal. 244; 19 Cal. 157; 22 Cal. 465; 23 Cal. 269; 40 Cal. 479; 50 Cal. 282; 53 Cal. 393, 495; Cereghino v. Superior Court, 2nd, 1880, 5 Pac. C. L. J. 53. *Extent of review*—sec. 1074, law or judgment, not corrected, 29 Cal. 459, 632; 40 Cal. 43; 43 Cal. 312, 365; 45 Cal. 245; 46 Cal. 70, 667; 47 Cal. 604. *Proper*, 2 Cal. 262; *certiorari proper*, 39 Cal. 570; 51 Cal. 95; Bateman v. Superior Court, etc., March 6th, 1880, 5 Pac. C. L. J. 140. *Cal. F. Co. v. Halsey*, March 15th, 1880, 5 Pac. C. L. J. 140.

Requisite for certiorari, 1 Cal. 152; 4 Cal. 185; 13 Cal. 173; 18 Cal. 166; 23 Cal. 115; 42 Cal. 252; 43 Cal. 25; 47 Cal. 7, 528; Cereghino v. Finocchio, Feb. 2nd, 1880, 5 Pac. C. L. J. 53.

Discretion of the court—discretion to refuse writ, 42 Cal. 252; Cal. 473; discretion in quashing; Lamb v. Schottler, March 17th, 1880, 5 Pac. C. L. J. 140.

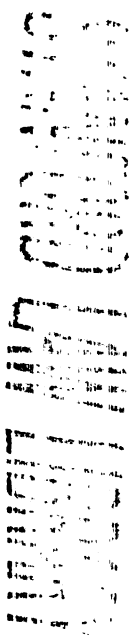
Plain, speedy, and adequate remedy—see NO APPEAL, note *supra*, 4 Cal. 479; 47 Cal. 528; Lamb v. Schottler, March 17th, 1880, 5 Pac. C. L. J. 140.

The application must be made on affidavit by a person officially interested, and the court may refuse to grant the application to be given to the adverse party, or may grant an order to show cause why it should be granted, or may grant the writ without notice.

Notice of, 49 Cal. 136; Supreme Ct. rule 28. *Notice of*—38 Cal. 136; *officially interested*, see sec. 367n; 53 Cal. 389. *Issuance of writ* of the Court, 40 Cal. 481; Supreme Ct. rule 23.

The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. It may be directed to a tribunal, the clerk, if there be one, or to the officer with the transcript required.

PROC.—33.



Directed to inferior tribunal, etc.—53 Cal. 644; *Lamb v. Schottler*, March 17th, 1880, 5 Pac. C. L. J. 140.

Return of writ—sec. 1075, 34 Cal. 352; 53 Cal. 644; transcript required—see CERTIFYING RECORD AND PROCEEDINGS, sec. 1071a.

§ 1871. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings, (describing or referring to them with convenient certainty) that the same may be reviewed by the court; and requiring the party, in the meantime to desist from further proceedings in the matter to be reviewed.

Party to whom directed—*Lamb v. Schottler*, March 17th, 1880, Pac. C. L. J. 140.

Certifying record and proceedings—32 Cal. 50, 582; 34 Cal. 352.

At specified time—see Supreme Ct. rule 23.

§ 1072. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court; but if omitted, the power of the inferior court or officer is not suspended or the proceeding stayed.

§ 1073. The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court.

Service of writ—on public tribunal, etc., and proof of same, Supreme Ct. rule 23.

Service of summons—sec. 410 *et seq.*

§ 1074. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

Extent of review—see under EXCEEDED THE JURISDICTION, sec. 1068n; 14 Cal. 479; 35 Cal. 269; 43 Cal. 365; 53 Cal. 204, 644.

Regularly pursued its authority—interpretation of, 43 Cal. 365; 53 Cal. 204; *Bateman v. Superior Court*, etc., March 6th, 1880, 5 Pac. C. L. J. 77.

§ 1075. If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling or modifying the proceedings below.

Return—sec. 1070n.

Hearing—see GRANTED BY ANY COURT, sec. 1068n.

Modifying proceedings below—39 Cal. 570.

1076. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified up.

1077. A copy of the judgment, signed by the clerk, referred upon or attached to the writ and return, constitutes the judgment roll.

judgment roll—petition no part of, 47 Cal. 604.

STANFORD LAW LIBRARY

CHAPTER II. WRIT OF MANDATE.

- § 1084. Mandate defined.
 § 1085. When and by what court issued.
 § 1086. Writ, when and upon what to issue.
 § 1087. Must be either alternative or peremptory. Substance.
 § 1088. If the application be without notice, the alternative writ must be issued; otherwise, the peremptory. Notice and default.
 § 1089. The adverse party may answer under oath.
 § 1090. If an essential question of fact is raised, the court may order a jury trial.
 § 1091. The applicant may demur to the answer or countervail it by proof.
 § 1092. Motion for new trial, where made.
 § 1093. The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on the motion.
 § 1094. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.
 § 1095. If the applicant succeed, he may have damages, costs, and a peremptory mandate.
 § 1096. Service of the writ.
 § 1097. Penalty for disobedience to the writ.

§ 1084. The writ of mandamus may be denominated writ of mandate. [In effect July 1st, 1874.]

Writ—sec. 51a.

§ 1085. It may be issued by any court, except a Justice's or Police Court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

Issued by any court—by superseded courts, 30 Cal. 244; 45 Cal. 67; 49 Cal. 31; power to issue, see secs. 51, 76, subd. 5, and notes to same not issued where no longer necessary, 36 Cal. 289; Supreme Court original jurisdiction, 47 Cal. 205; *Hyatt v. Allen*, March 23rd, 1880; Pac. C. L. J. 664.

Inferior tribunal, etc.—Discretion not interfered with, 7 Cal. 27; 10 Cal. 376; 23 Cal. 34; 28 Cal. 630.

Corporation—private, against, see *When not proper*, under Mandamus, scope and function of, note *infra*.

Board—see SUPERVISORS, under next note.

Persons, official—to whom writ directed: auditor, county, 44 Cal.

Cal. 523; 47 Cal. 488: assessor, county, 30 Cal. 645: clerk of board supervisors, 52 Cal. 411: clerks of court, 1 Cal. 143; 10 Cal. 333; 14 Cal. 60; 28 Cal. 69; 40 Cal. 281: comptroller, State, 2 Cal. 165; 7 Cal. 63; 11; generally, *McCauley v. Brooks*, 16 Cal. 11: governor, 16 Cal. 11; Cal. 596; 39 Cal. 189: judge, 2 Cal. 245; 17 Cal. 132; 31 Cal. 215; 43 Cal. 11; and see *When not proper*, under MANDAMUS, SCOPE AND FUNCTION OF, note *infra*: sheriff, 10 Cal. 211; and see *When not proper*, under MANDAMUS, SCOPE AND FUNCTION OF, note *infra*: street superintendent, 36 Cal. 411: supervisors, 6 Cal. 254; 10 Cal. 410; 11 Cal. 42; 12 Cal. 11; Cal. 668; 28 Cal. 429; 30 Cal. 435; 43 Cal. 270, 353; 50 Cal. 561: tax collector, 20 Cal. 318: treasurer, county, 39 Cal. 593; and see *When not proper*, under MANDAMUS, SCOPE AND FUNCTION OF, note *infra*.

Performance of an act—compelling, but judicial or discretionary act not undone, 24 Cal. 78; 28 Cal. 639; 36 Cal. 283; 37 Cal. 532; 41 Cal. 11; and see next note.

Resulting from an office, etc.—4 Cal. 177; 7 Cal. 278; 10 Cal. 376; 11 Cal. 318; 25 Cal. 26; 30 Cal. 325, 676; 39 Cal. 411; 43 Cal. 225; 51 Cal. 11.

Mandamus, scope and function of—*Demand* before application, 1 Cal. 91; 20 Cal. 72; 37 Cal. 362; 53 Cal. 199. *Directed*, to whom, see SCOPE AND FUNCTION OF, note *infra*. *Discretion* not controlled, see INFERIOR TRIBUNAL, etc.; also, PERFORMANCE OF AN ACT, notes *infra*. *Record*, showing of, 18 Cal. 432; 46 Cal. 53; 48 Cal. 47. *When not proper*, sec. 1086; 1 Cal. 143; 4 Cal. 177; 7 Cal. 286; 16 Cal. 11, 436; 21 Cal. 11; Cal. 325; 50 Cal. 561; 51 Cal. 328; *Talcott v. Blanding*, March Term, 1880; 5 Pac. C. L. J. 86; and see notes *supra*. *When not proper*, of board of supervisors, against, 52 Cal. 411: corporation, *præterea*, against, 44 Cal. 173: courts, co-ordinate, between, 1 Cal. 149, and 11 Cal. 638: judge, against, 14 Cal. 230; 28 Cal. 166; 29 Cal. 307; 33 Cal. 283; 37 Cal. 532; 39 Cal. 411; 45 Cal. 248; 50 Cal. 409; 53 Cal. 11; office, trying title to, etc., 3 Cal. 167; 7 Cal. 442; 13 Cal. 621; 50 Cal. 53; 53 Cal. 3: sheriff, against, 6 Cal. 91; 17 Cal. 476; 22 Cal. 142; 53 Cal. 11; treasurer, against, 11 Cal. 351; 18 Cal. 354; 20 Cal. 593; 49 Cal. 11.

1086. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, and the application of the party beneficially interested.

Plain, speedy, and adequate remedy—Prevents issuance, where appeal, Cal. 594; 9 Cal. 7, 18; 15 Cal. 149; 24 Cal. 79; 29 Cal. 427; 50 Cal. 509; generally, 40 Cal. 278; and see *When not proper*, under SCOPE AND FUNCTION OF MANDAMUS, sec. 1085*n*. *Issuance proper, where lacking*, where no appeal, 43 Cal. 225: or appeal inadequate remedy, 7 Cal. 130: generally, 36 Cal. 283, and see, *When proper*, under SCOPE AND FUNCTION OF MANDAMUS, sec. 1085*n*.

Based on affidavit—insufficient showing, 22 Cal. 142: by Supreme Court, see Supreme Ct. rule 28.

Application—by whom; party beneficially interested, sec. 367*n*; 25 Cal. 26; 26 Cal. 641; 29 Cal. 210.

1087. The writ may be either alternative or peremptory. The alternative writ must state generally the facts against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act

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required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return day inserted.

Peremptory writ—without alternative, sec. 1088, and note.

Command such party—nature of directions, 6 Cal. 440; 33 Cal. 48.

§ 1088. When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

Proof of service—on public body, Supreme Ct. rule 28.

Peremptory writ—without alternative, 1 Cal. 143; 27 Cal. 684.

§ 1089. On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

Answer—sec. 437, and notes; 27 Cal. 655.

§ 1090. If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess an amount of damages which the applicant may have sustained, in case they find for him.

Question to be tried—9 Cal. 20; 14 Cal. 428; 17 Cal. 476.

Order for trial—form of, 45 Cal. 395.

§ 1091. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance.

Sufficiency of answer—objection to, equivalent to general demurrer, 27 Cal. 655; 30 Cal. 599; 48 Cal. 36.

1092. The motion for a new trial must be made in court in which the issue of fact is tried.

by trial—generally, sec. 656, *et seq.*: in Supreme Court, when original jurisdiction exercised, 25 Cal. 635.

1093. If no notice of a motion for a new trial be made, or, if given, the motion be denied, the clerk, within ten days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict or judgment to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

1094. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case. [In effect July 1st, 1874.]

papers of the applicant—see ISSUED ON AFFIDAVIT, sec. 1066a.

1095. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.

judgment in mandamus—extent of relief, 27 Cal. 655, and compare 1090, and note: personal, when improper, see under PEREMPTORY MANDATE, note *infra*.

damages—sec. 580a.

costs—secs. 1021 *et seq.*

peremptory mandate—personal judgment on, when improper, 52 Cal. 38.

1096. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body, is service upon the board or body, whether at the time of the service the board or body was in session or not.

mode of summons—sec. 410, *et seq.*

1097. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, commission, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without

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just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ. [In effect July 1st, 1874.]

Officers subject to mandamus—see PERSONS, OFFICIAL, sec. 1085.

Attachment for non-compliance—when not issued, 1 Cal. 188.

Contempt—generally, sec. 1209 *et seq.*

CHAPTER III.

WRIT OF PROHIBITION.

1102. Prohibition defined.
 1103. Where and when issued.
 1104. Writ may be alternative or peremptory. Form of.
 1105. Certain provisions of the preceding chapter applicable.

1102. The writ of prohibition is the counterpart of writ of mandate. It arrests the proceedings of any individual, corporation, board, or person, whether exercising judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such individual, corporation, board, or person. [In effect March 1881.]

Writ, generally—sec. 51 *n.* Counterpart—53 Cal. 289. Mandate—104 *et seq.*
 Arrests proceedings—53 Cal. 292; but not legislation, 52 Cal. 111; on removal from office, 52 Cal. 622.

Judicial tribunals—alone subject to, 52 Cal. 111; 53 Cal. 289; *People v. Union Comms.* March 23rd, 1880, 5 Pac. C. L. J. 245.

In excess of the jurisdiction—47 Cal. 81, 584; *Bandy v. Ransome*, 19th, 1880, 4 Pac. C. L. J. 537; *Cal. F. Co. v. Halsey*, Mar. 15th, 1880, C. L. J. 125; and compare EXCEEDED THE JURISDICTION, sec.

1103. It may be issued by any court except Police or Justice Courts, to an inferior tribunal or to a corporation, individual, or person, in all cases where there is not a plain, adequate, and adequate remedy in the ordinary course of law.

It is issued upon affidavit, on the application of the party or person beneficially interested.

Compare—notes to secs. 1085, 1086.

Form of affidavit, contents of—30 Cal. 244.

Inferior tribunal—52 Cal. 111, 516.

1104. The writ must be either alternative or peremptory. The alternative writ must state generally the allegations against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until further order of the court from which it is issued, and show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except

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that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted.

Compare—sec. 1087, and notes.

§ 1105. The provisions of the preceding chapter, except of the four first sections thereof, apply to this proceeding.

CHAPTER IV.

WRITS OF REVIEW, MANDATE, AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.

Writs of review, mandate, and prohibition may issue and be heard at chambers.

B. Writs of review, mandate, and prohibition issued by the Supreme Court, or by a Superior Court, may, at the discretion of the court issuing the writ, be made returnable and a hearing thereon be had at any time. [Act of April 15th, 1880.]

Number of judges at chambers—secs. 165, 166.

CHAPTER V.

RULES OF PRACTICE, AND APPEALS.

§ 1109. Certain provisions of part two applicable.

§ 1110. Same.

9. Except as otherwise provided in this title, the provisions of part two, [§§ 307-1059] of this Code, are applicable, and constitute the rules of practice in the proceedings mentioned in this title.

10. The provisions of part two, of this Code, relating to new trials and appeals, [§§ 656-663, and §§ 936-959] in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title.

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TITLE II.
OF CONTESTING CERTAIN ELECTIONS

- 1111. Who may contest, and grounds of contest.
- 1112. Irregularity and improper conduct of judges, when to an elections.
- 1113. When not to.
- 1114. Illegal votes, when not to vitiate election.
- 1115. Proceedings on contest.
- 1116. Statement of cause of contest. When based on reception illegal votes, contestant to deliver to respondent a list of votes claimed to be illegal.
- 1117. Statement of cause of contest; want of form not to vitiate election.
- 1118. County judge to hold special term for trial of contest.
- 1119. Clerk to issue citation to respondent.
- 1120. Witnesses—attendance of, how enforced.
- 1121. Power of court. Adjournment of court.
- 1122. Rules to govern court in trial of contest.
- 1123. Court may declare who was elected.
- 1124. Fees of officers and witnesses.
- 1125. Costs.
- 1126. Appeal.
- 1127. When election void and office vacant.

§ 1111. Any elector of a county, city and county, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes:

1. For malconduct on the part of the board of judges or any member thereof;
2. When the person whose right to the office is contested was not, at the time of the election, eligible for such office;
3. When the person whose right is contested has given to any elector or inspector, judge, or clerk of the election any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise, defined in title four, part one, of the Penal Code;
4. On account of illegal votes. [Approved March 11 1876.]

Contesting elections—*Generally*, title constitutional, 13 Cal. construction of election laws, 31 Cal. 82; forms a special case, 24 Cal. 449; locally applicable, 46 Cal. 398; county seats, election for, not ordered, 30 Cal. 325; 24 Cal. 449; requisites of election, etc., 28 Cal. 433; *Elector*, 43 Cal. 229. *Person declared elected*, legislator, governor, Political Code, secs. 273, 288. *Office*, illegally occupied, etc. sec. 803.

SUBDIVISION 1. Malconduct of judges—secs. 1112, 1113; 2 Cal. 12 Cal. 352; 26 Cal. 161; 31 Cal. 82.

CONTESTING CERTAIN ELECTIONS. §§ 1112-15

SECTION 2. Ineligibility, effect of, 13 Cal. 145; 23 Cal. 315.

SECTION 3. Bribery, etc.—27 Cal. 655.

SECTION 4. Illegal votes—14 Cal. 479; 28 Cal. 124; 34 Cal. 273.

1. No irregularity or improper conduct in the process of the judges, or any of them, is such malconduct avoids an election, unless the irregularity or conduct is such as to procure the person whose office is contested to be declared elected, had not received the highest number of legal

votes of judges—as ground of contest, sec. 111, subd. 1: Irregularity, must alter result, 12 Cal. 352; 31 Cal. 173; 34 Cal. 273, 635.

2. When an election held for an office exercised in a county is contested on account of any malconduct on the part of the board of judges of any township, or any member thereof, the election cannot be set aside and set aside upon any proof thereof, unless the number of the vote of such township or townships is such as to change the result as to such office in the remaining part of the county.

3. Contest of judges—see sec. 1112n. Township, or precinct, 20 Cal. 173; and see VOTING PRECINCTS, sec. 1116n.

4. Nothing in the fourth ground of contest, specification eleven hundred and eleven, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, or by deducting therefrom the illegal votes which are shown to have been given to such other person.

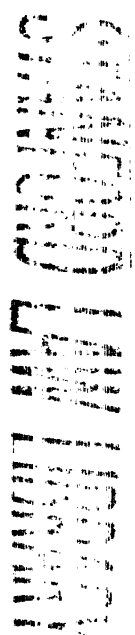
5. Irregularities, etc., must alter result, under MALCONDUCT OF JUDGES, sec. 1112n.

6. When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of the election, file with the clerk a written statement, setting forth specific

the name of the party contesting such election, and the name of an elector of the district, county, or township, in which such election was held; the name of the person whose right to the office is

contested;

CIV. PROC.—33.



4. The particular grounds of such contest.

Which statement must be verified by the affidavit of the contesting party, that the matters and things therein contained are true.

Elector—43 Cal. 229.

Within forty days—31 Cal. 261.

Statement of contestant—see secs. 1116, 1117; 30 Cal. 394; 43 Cal. 2

§ 1116. When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that in one or more specified voting precincts illegal votes were given to the person whose election is contested, which, taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony can be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove at such trial; and no testimony can be received of any illegal votes except such as are specified in such list. [In effect April 15th, 1880.]

Three days before trial—list delivered, need of, 30 Cal. 393; computation of time, sec. 12n; 51 Cal. 514.

Voting precincts—townships, before amdt. 1880.

§ 1117. No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested.

§ 1118. Upon the statement being filed, the county clerk must inform the Superior Court of the county thereof, which shall thereupon order a special session of such court to be held at the court-room, on some day to be named by it, not less than ten nor more than twenty days from the date of such order, to hear and determine such contested election. [In effect April 15th, 1880.]

Special session—term, before 1880, 24 Cal. 453, and see TERMS, s. 73n.

§ 1119. The clerk shall thereupon issue a citation to the person, whose right to the office is contested, to appear at the time and place specified in the order, which citation must be delivered to the sheriff, and served either upon the party in person, or, if he cannot be found, leaving a copy thereof at the house where he last reside

CONTESTING CERTAIN ELECTIONS. §§ 1120-5

five days before the time so specified. [In effect
1880.]

form immaterial, 30 Cal. 394.

The clerk must issue subpoenas for witnesses
request of either party, which must be served as
subpoenas; and the Superior Court shall have full
power to issue attachments to compel the attendance of
witnesses who have been subpoenaed to attend. [In effect
1880.]

issuance, service, etc., secs. 1985-1987; also see secs. 1988-
1992, penalty, etc., secs. 1991-1992.

enforcing attendance of witnesses—sec. 1993 *et seq.*

The court must meet at the time and place
designated, to determine such contested election, and
exercise all the powers necessary to the determination
thereof. It may adjourn from day to day until such trial
commences and may also continue the trial, before its com-
mencement, for any time not exceeding twenty days, for
cause shown by either party upon affidavit, at the
request of the party applying for such continuance.

continuance from day to day—discontinuance otherwise, 34 Cal. 329, 635.
commencement—34 Cal. 332.

The court must be governed, in the trial and
determination of such contested election, by the rules of
evidence governing the determination of ques-
tions of law and fact, so far as the same may be applica-
ble. The court may dismiss the proceedings if the statement of
facts or causes of the contest is insufficient, or for
want of prosecution. After hearing the proofs and alle-
gations of the parties, the court must pronounce judg-
ment on the premises, either confirming or annulling and
setting aside such election.

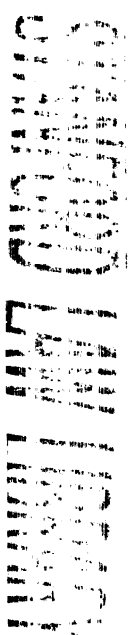
dismissing the proceedings—not discretionary, 15 Cal. 117.

hearing the proofs, etc.—no default, judgment obtainable by
34 Cal. 635; burden on contestant, 12 Cal. 352.

If in any such case it appears that another per-
son has been returned who has the highest number of legal
votes, the court must declare such person elected.

Repealed April 15th, 1880.

If the proceedings are dismissed for insuffi-
cient cause, or for want of prosecution, or the election is by the
court affirmed, judgment must be rendered against the
party contesting such election, for costs, in favor of the
party whose election was contested; but if the election is



§§ 1126-7 CONTESTING CERTAIN ELECTIONS. 3

annulled and set aside, judgment for costs must be rendered against the party whose election was contested, favor of the party contesting the same. *Primarily*, each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in other cases. [In effect April 15th, 1880.]

Costs—in special proceedings, secs. 1022, subd. 4, 1024: generally, s. 1021 *et seq.*

§ 1126. Either party, aggrieved by the judgment of the court, may appeal therefrom to the Supreme Court, as in other cases of appeal thereto from the Superior Court. [In effect April 15th, 1880.]

Appeal in contested election cases—31 Cal. 82, 261.

Appeals to Supreme Court—sec. 963: appeals generally, sec. 963 *et seq.*

New trial—24 Cal. 449, 457.

§ 1127. Whenever an election is annulled or set aside by the judgment of the Superior Court, and no appeal has been taken within ten days thereafter, the commission, if any has issued, is void, and the office vacant. [In effect April 15th, 1880.]

TITLE III.

Of Summary Proceedings.

Confession of judgment without action.

Submitting a controversy without action.

Discharge of persons imprisoned on civil process.

Summary proceedings for obtaining possession of real property in certain cases.

[389]

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1881

CHAPTER I.

CONFESSION OF JUDGMENT WITHOUT ACTION.

§ 1132. Judgment may be confessed for debt due or contingent liability.

§ 1133. Statement in writing and form thereof.

§ 1134. Filing statement and entering judgment.

§ 1135. How, in Justices' Courts.

§ 1132. A judgment by confession may be entered without action, either for money due or to become due or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.

Judgment by confession—after action commenced, 44 Cal. 4 statement for, sec. 1133 and note: attacking for fraud, sec. 1133a.

Any court having jurisdiction—8 Cal. 76; in Justice's Court, s. 1135 and note.

Statement—signed by defendant, 20 Cal. 681; subd. 2, subject-matter of indebtedness, 12 Cal. 143; 18 Cal. 576; 37 Cal. 328: justly due, etc. Cal. 549; 37 Cal. 328.

Attacking for fraud—*Judgment fraudulent, when, prima facie* where statement lacks statutory fullness, 6 Cal. 419; 12 Cal. 143; 18 Cal. 576; 37 Cal. 328: void for obstructing creditors, 6 Cal. 238; 13 Cal. 76; Cal. 681. *Proof*, 6 Cal. 422; 12 Cal. 143; 19 Cal. 278; 20 Cal. 681; 27 Cal. 244 Cal. 481. *Creditor's rights*, attachment confers, 6 Cal. 376; 13 Cal. direct proceedings, 6 Cal. 238; 37 Cal. 328. *Debtor's rights*, preference permitted, 19 Cal. 278: impeaching directly, 5 Cal. 513. *Collateral impeachment*, 12 Cal. 128.

§ 1133. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

§ 1134. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed thereupon, becomes the judgment roll.

§ 1135. In a Justice's Court, where the court has authority to enter the judgment, the statement may be filed with the justice, who must thereupon enter in his docket a judgment of his court for the amount confessed, with three dollars costs. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.

Authority of Justice's Court to enter—secs. 112, subd. 6, 889; and see § Cal. 76.

CHAPTER II.
SUBMITTING A CONTROVERSY WITHOUT
ACTION.

§ 1138. Controversy, how submitted without action.

§ 1139. Judgment on, as in other cases, but without costs prior to
trial.

§ 1140. Judgment may be enforced or appealed from as in an action.

§ 1138. Parties to a question in difference, who might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court must thereupon hear and determine the case, and render judgment thereon, as if an action were dependent.

Submitting agreed case—22 Cal. 72; 30 Cal. 218; 41 Cal. 60. *Admission of stipulation no substitute for, 20 Cal. 679. Judgment, basis of, 20 Cal. 72.*

§ 1139. Judgment must be entered in the judgment book as in other cases, but without costs for any proceedings prior to the trial. The case, the submission, and a copy of the judgment, constitute the judgment roll.

Entry of judgment—sec. 664.

Judgment roll—sec. 670.

§ 1140. The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.

Enforcement of judgment—sec. 684.

Appeals—sec. 936 *et seq.*

CHAPTER III.

DISCHARGE OF PERSONS IMPRISONED
ON CIVIL PROCESS.

- 1143. Persons confined may be discharged.
- 1144. Notice of application.
- 1145. Service of notice.
- 1146. Examination before judge.
- 1147. Interrogatories may be in writing.
- 1148. Oath to be administered.
- 1149. Order of discharge.
- 1150. If not discharged, prisoner may again apply, when.
- 1151. Discharge final.
- 1152. Judgment remains in force.
- 1153. Plaintiff may order discharge of the prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.
- 1154. Plaintiff to advance funds for support of prisoner.

§ 1143. Any person confined in jail on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions in this chapter specified.

§ 1144. Such person must cause a notice in writing to be given to the plaintiff, his agent, or attorney, that at a certain time and place he will apply to a judge of the Superior Court of the county in which such person may be confined, for the purpose of obtaining a discharge from his imprisonment. [In effect April 16th, 1880.]

Notices—sec. 1010 *et seq.*

§ 1145. Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application.

Service of notice—sec. 1015.

§ 1146. At the time and place specified in the notice, such person must be taken before such judge, who must examine him under oath concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

§ 1147. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories

pertinent to the inquiry; and they must, if required him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner.

§ 1148. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to wit: "I, — do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed in any way disposed of, with design to secure the same to my use, or to hinder, delay, or defraud my creditors, so help me God."

Order of discharge—appeal from, 35 Cal. 696.

§ 1149. After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause.

§ 1150. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every proceeding ten days, in the same manner as above provided, and the same proceedings must thereupon be had.

§ 1151. The prisoner, after being so discharged, is never exempted from arrest or imprisonment for the same debt, unless he be convicted of having willfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

§ 1152. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

§ 1153. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

§ 1154. Whenever a person is committed to jail on execution issued on a judgment recovered in an action, the creditor, his agent or attorney, must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment.

ment, and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody; and such discharge has the same effect as if made by order of the creditor

Advance to the jailer—credit permissible, 50 Cal. 306.

CHAPTER IV.

SUMMARY PROCEEDINGS FOR OBTAINING
POSSESSION OF REAL PROPERTY
IN CERTAIN CASES.

1159. Forcible entry defined.
 1160. Forcible detainer defined.
 1161. Unlawful detainer defined.
 1162. Service of notice.
 1163. County Courts have jurisdiction.
 1164. Parties defendant.
 1165. Parties generally.
 1166. Complaint. Judge to fix day for appearance of defendant and summons.
 1167. Summons, form and service of.
 1168. Arrest.
 1169. Judgment by default.
 1170. Defendant may appear, etc.
 1171. Trial by jury.
 1172. Showing required of plaintiff in forcible entry or detainer. O defendant.
 1173. Complaint must be amended in certain cases.
 1174. Verdict and judgment.
 1175. Verification of complaint and answer.
 1176. Effect of an appeal upon the judgment.
 1177. Rules of practice.
 1178. Appeals, how taken, etc.
 1179. Relief against forfeiture of lease.

§ 1159. Every person is guilty of a forcible entry who either—

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or,
2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession.

Forcible entry and detainer—*Scope of statute*, Code, reconstruction of, 49 Cal. 273; summary remedy, 5 Cal. 113; 12 Cal. 500; grounds of action, 9 Cal. 47; trespass not enough, 5 Cal. 156; 29 Cal. 214; force as element of, 9 Cal. 47, and see note *infra*: title not triable, see sec. 1172*n*. proof required, sec. 1172: possession, sec. 1172*n*.

Forcible entry—requisites, 23 Cal. 379; 28 Cal. 527; 29 Cal. 214; parties plaintiff, sec. 1165, note; parties defendant, secs. 1164 and note, 1165; force as element, see *infra*.

SUBDIVISION 1. Violence, etc.—see FORCE, in entry, note *infra*.

SUBDIVISION 2. Force—In entry, 5 Cal. 63; 23 Cal. 375; 25 Cal. 54; 31 Cal. 122; 32 Cal. 340; 38 Cal. 693; 39 Cal. 23; 42 Cal. 152; in ouster, 5 Cal.

63; 6 Cal. 63; 15 Cal. 223; 23 Cal. 413; 29 Cal. 214; 32 Cal. 340; 38 Cal. 633; 59 Cal. 677.

Party in possession—see POSSESSION, sec. 1172*n*.

§ 1160. Every person is guilty of a forcible detainer who either—

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

Forcible detainer—what constitutes, 24 Cal. 317; 29 Cal. 577; 45 Cal. 597; 50 Cal. 315.

ELEMENTS OF FORCIBLE DETAINER.

SUBDIVISION 1. Force—menaces, threats in entry and ouster, see sec. 1159*n*: in detainer, 9 Cal. 46; 24 Cal. 317; 28 Cal. 527; 29 Cal. 577; 31 Cal. 122; 38 Cal. 677; 39 Cal. 660. Acquired peaceably—*Immaterial whether*, 45 Cal. 597; 53 Cal. 667.

SUBDIVISION 2. Unlawfully enters—9 Cal. 48; 27 Cal. 505; 28 Cal. 187, 532; 29 Cal. 220; 38 Cal. 410; 41 Cal. 242; 45 Cal. 597, 673; 48 Cal. 361. After demand—9 Cal. 49; 24 Cal. 317; 37 Cal. 154; 38 Cal. 676. Occupant, possession of—see POSSESSION, sec. 1172*n*; 38 Cal. 410; 41 Cal. 630; 51 Cal. 532, 541.

• § 1161. A tenant of real property, for a term less than life, is guilty of unlawful detainer—

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. Where he continues in possession, in person or by subtenant, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, and if there be a subtenant in

actual occupation of the premises, also upon such subtenant. Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term without any demand for possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, and the successor in estate of his landlord, if any there be, shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consequence on the part of a tenant to hold for another year.

3. When he continues in possession, in person or as subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, *including any covenant not to assign or sublet*, than the one for the payment of rent, and after three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, as well upon such subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture;* [*provided*, if the covenants and conditions of lease, violated by the lessee, cannot afterwards be performed, then no notice, as last prescribed here, need be given to said lessee or his subtenant demanding the performance of the violated covenant or conditions of the lease.] A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to an under-tenant, in case of his unlawful detention of the premises underlet to him.

4. *Any tenant or subtenant, assigning or subletting,*

* Two bills amending § 1161, Senate bills 442 and 665, were passed the twenty-second session, both of which were to take effect immediately. They were both approved on the same day, April 1st, 1878. We have consolidated the two laws, *italicizing* the words of bill No. 442 not in bill No. 665, and incorporating in [brackets] the only words of bill No. 665 not in No. 442. Reading the section as printed, and omitting words within the brackets, will give the law as enacted by bill No. 442. Omitting the italics and including the brackets will give that of bill No. 665.

committing waste upon the demised premises, contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall, upon service of three days' notice to quit, upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this act. [Approved April 1st, 1878. In effect immediately.]

UNLAWFUL DETAINER.

Landlord and tenant, conventional relation of—what constitutes, 25 Cal. 63; 27 Cal. 502; 28 Cal. 224; successor in estate of landlord, see 28 Cal. 169; essential to action, 21 Cal. 316; 23 Cal. 521; 28 Cal. 224; 29 Cal. 661; 33 Cal. 401; 34 Cal. 265; 36 Cal. 303; 43 Cal. 299; cessation of, 28 Cal. 224; 33 Cal. 401; 36 Cal. 303; 47 Cal. 180; 48 Cal. 639; prevents trial of title, see sec. 1172a; tenant's estoppel, see under DEFENSE, sec. 1172a.

SUBDIVISION 1. Holding over—Generally, essential element, 4 Cal. 176. After expiration of term, demand and notice, 4 Cal. 208; 6 Cal. 189; 49 Cal. 121; tenant at sufferance, 25 Cal. 31; 38 Cal. 563; 39 Cal. 565. Tenancy at will, notice terminating, Civil Code, secs. 789-791, 793; 41 Cal. 236; 51 Cal. 181.

SUBDIVISION 2. Non-payment of rent—demand, 3 Cal. 273; 16 Cal. 88; 40 Cal. 384; tender, 41 Cal. 360; forfeiture, 3 Cal. 273; 16 Cal. 88; 25 Cal. 394; 41 Cal. 432; 50 Cal. 3; subtenant, 23 Cal. 227.

SUBDIVISIONS 3 and 4. Breach of other covenants—form of notice, 32 Cal. 471.

§ 1162. The notices required by the preceding section may be served, either:

1. By delivering a copy to the tenant personally; or,
2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or,
3. If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner. [In effect July 1st, 1874.]

§ 1163. The Superior Court of the county in which the property, or some part of it, is situated, shall have jurisdiction of proceedings under this chapter; *provided*, that Justices' Courts, within their respective townships, or cities, or cities and counties, shall have concurrent jurisdiction with the Superior Courts in cases of forcible entry

and detainer, when the rental value does not exceed twenty-five dollars per month, and when the whole amount of damages claimed does not exceed two hundred dollars. [In effect March 9th, 1880.]

Superior Court of county—former jurisdiction of County Court held constitutional, 28 Cal. 118; 30 Cal. 573; 31 Cal. 122; 42 Cal. 324.

Concurrent jurisdiction of Justices' Court—sec. 113, subd. 1, and notes: jurisdiction under former statute, before Code, 2 Cal. 358; 6 Cal. 63, 161, 447; 20 Cal. 282; 23 Cal. 375.

§ 1164. No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the non-joinder of any persons who might have been made parties defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offense charged, judgment must be rendered against him. In case a married woman be a tenant or a subtenant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action. [In effect July 1st, 1874.]

Parties defendant—19 Cal. 374; 20 Cal. 48; 23 Cal. 214: married woman, 20 Cal. 282; 39 Cal. 287.

Parties plaintiff—and generally, sec. 1165, and note.

§ 1165. Except as provided in the preceding section the provisions of part two of this Code, relating to parties to civil actions, are applicable to this proceeding.

Parties plaintiff—5 Cal. 113; 8 Cal. 499; 27 Cal. 502; 29 Cal. 168; 31 Cal. 333; 36 Cal. 303: agents as, 16 Cal. 107; 20 Cal. 45: cotenants as, 3 Cal. 45 Cal. 495: generally, see POSSESSION, sec. 1172a.

Parties defendant—sec. 1164, and note.

§ 1166. The plaintiff, in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint, a summons must be issued thereon as in other cases, returnable at a day designated

therein, which shall not be less than three days nor more than twelve days from its date, except in cases when the publication of the summons is necessary, in which case the court, or a judge or justice thereof, may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed. [In effect March 9th, 1880.]

Complaint, sufficiency of—9 Cal. 46; 16 Cal. 107; 23 Cal. 528; 27 Cal. 275; 28 Cal. 170; 29 Cal. 642. *Uniting causes of action*, 15 Cal. 315; 28 Cal. 327; 31 Cal. 122; 32 Cal. 340; 33 Cal. 410; 40 Cal. 351, 484; 46 Cal. 276. *Description of premises*, 4 Cal. 282; 16 Cal. 73; 28 Cal. 170. *Force*, see sec. 1159, subd. 2n, and 1160, subd. 1n. *Damages*, sec. 1174; 17 Cal. 567; 21 Cal. 55. *Verification*, sec. 1175. *Generally*, see sec. 426, and notes.

Summons—sec. 1167.

§ 1167. The summons must state the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day, and must notify the defendant to appear and answer within the time designated, or that the relief sought will be taken against him. The summons must be directed to the defendant, and be served at least two days before the return day designated therein, and must be served and returned in the same manner as summons in civil actions is served and returned. Upon the return of any summons issued under this chapter, where the same has not, for any reason, been served, or not served in time, the plaintiff may have a new summons issued, the same as if no previous summons had been issued. [In effect March 9th, 1880.]

Contents of summons—if defective, how waived, 41 Cal. 242.

Service of summons—herein, before Code, 50 Cal. 185; in civil actions, sec. 406 *et seq.*

§ 1168. If the complaint presented establishes, to the satisfaction of the judge or justice, fraud, force, or violence, in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant. [In effect March 9th, 1880.]

Arrest—generally, sec. 478 *et seq.*

§ 1169. If, at the time appointed, the defendant do not appear and defend, the court must enter his default, and render judgment in favor of the plaintiff, as prayed for in the complaint.

Judgment by default—generally, sec. 585.

§ 1170. On or before the day fixed for his appearance, the defendant may appear and answer or demur.

Appearance—generally, sec. 1014, and notes.

Answer—Scope of, sec. 1172; Warburton v. Doble, 38 Cal. 619. Waiver, of defect in summons, 41 Cal. 242. Insufficient denial, 28 Cal. 131 Cal. 467; 38 Cal. 619: objection too late, Spiers v. Duane, Feb. 16, 1880, 5 Pac. C. L. J. 10. Verification, sec. 1175. "Or demur," 38 Cal. 619. Generally, sec. 437, and notes.

§ 1171. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury is waived as in other cases. The jury shall be formed in the same manner as other trial juries in the Court in which the action is pending. [In effect March 9th, 1880.]

Trial by jury—secs. 600-628: issue of fact, sec. 590 *et seq.*: waiver, sec. 631.

Justices' Courts—trials in, secs. 878-887.

Formation of the jury—secs. 600-604.

§ 1172. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense, that he, or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

Title not triable—12 Cal. 500; 23 Cal. 381; 29 Cal. 170; 37 Cal. 154; Cal. 250; 46 Cal. 64; but see 38 Cal. 619.

Possession, by plaintiff—*Showing of, necessary, 5 Cal. 113; 27 Cal. 502; 28 Cal. 170. Extent of, inclosure, etc. 6 Cal. 63; 15 Cal. 315; 23 Cal. 381, 413; 32 Cal. 340; 36 Cal. 530; 45 Cal. 597. Sufficient, 16 Cal. 107; 39 Cal. 24; 41 Cal. 630; Gray v. Collins, 42 Cal. 152; 45 Cal. 495, 597; 46 Cal. 601; Cal. 503: peaceable character of, 38 Cal. 619; 45 Cal. 495. Insufficient, Cal. 45; 38 Cal. 693; 40 Cal. 351; 46 Cal. 270, 641; 50 Cal. 315: when scrambling, 8 Cal. 499; 20 Cal. 83; 23 Cal. 526; 28 Cal. 187; 36 Cal. 580; Cal. 74; but see Spiers v. Duane, Feb. 16th, 1880, 5 Pac. C. L. J. 10. Evidence of, 23 Cal. 381; 37 Cal. 59; 39 Cal. 660; 52 Cal. 89.*

Force, evidence of—to maintain forcible entry and detainer, 36 Cal. 50; 39 Cal. 660.

Defense—in answer, sec. 1170a; in evidence, see defendant's showing: year's quiet possession, 43 Cal. 299; defendant's showing, 21 Cal. 309; 23 Cal. 381; 25 Cal. 31; 34 Cal. 265; 36 Cal. 303, 580; 39 Cal. 23; 45 Cal. 45; 47 Cal. 180; 48 Cal. 639; tenant's estoppel, sec. 1962, subd. 4, and note; 8 Cal. 593; 21 Cal. 309; 29 Cal. 168; 40 Cal. 246; 43 Cal. 299.

§ 1173. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith

with amended to conform to such proofs. Such amendment must be without any imposition of terms. No continuance must be permitted upon account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor.

Amendment—of complaint herein, 32 Cal. 340; 38 Cal. 410; generally, sec. 473*n*.

Continuance—generally, sec. 595 and notes.

§ 1174. If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in the payment of the rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment, as here provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately. [In effect July 1st, 1874.]

Verdict of the jury—what it decides, 10 Cal. 211; 36 Cal. 580.

Judgment—scope of, 6 Cal. 148.

Restitution of the premises—enforcement of writ, etc., sec. 684. Cal. 148; 10 Cal. 211; 19 Cal. 374; 33 Cal. 402; 39 Cal. 287; 46 Cal. 270, 271.

Forfeiture—relief from, sec. 1179.

Damages—Extent of, 17 Cal. 566; 28 Cal. 527; 31 Cal. 467; 33 Cal. 38 Cal. 620. Rent due, amount of, 20 Cal. 282; 21 Cal. 53; 27 Cal. 563; Cal. 246. Trebling, sec. 735; 4 Cal. 412; 6 Cal. 63, 161; 15 Cal. 149; 23 Cal. 375; 25 Cal. 262; 33 Cal. 401.

§ 1175. The complaint and answer must be verified.
Verification of pleadings—sec. 446 and notes.

§ 1176. An appeal taken by the defendant shall stay proceedings upon the judgment, unless the judge of justice before whom the same was rendered so directs. [In effect March 9th, 1880.]

§ 1177. Except as otherwise provided in this chapter, the provisions of part two, of this Code, are applicable and constitute the rules of practice in the proceedings mentioned in this chapter.

Appeal as stay—generally, secs. 946, 949, and notes.

§ 1178. The provisions of part two, of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

§ 1179. The court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in section one thousand one hundred and seventy-four. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made. [In effect March 9th, 1880.]

TITLE IV.

Of the Enforcement of Liens.

- CHAP.** **I.** Liens in general.
 II. Liens of mechanics and others upon real
 property.
 III. Certain liens for salaries and wages.

CHAPTER I.
LIENS IN GENERAL.

§ 1180. Definition of lien.

§ 1180. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.

Lien, definition of—Civil Code, sec. 2872.

Priority of liens—Civil Code, sec. 2897.

CHAPTER II.
LIENS OF MECHANICS AND OTHERS
UPON REAL PROPERTY.

- 1183. What laborers, contractors, etc., may have liens upon.
- 1184. Liens for grading and filling lots and streets.
- 1185. What interest in the land subject to the lien.
- 1186. Effect of liens.
- 1187. Claim of lien to be filed in recorder's office.
- 1188. Lien upon two or more pieces of property. Amount due for each to be designated.
- 1189. Claim to be recorded. Fees of recorder.
- 1190. Time of continuance of lien.
- 1191. Service of summons by publication.
- 1192. Subcontractors, who are, and when paid out of proceeds of sale.
- 1193. Costs.
- 1194. Court to declare rank of liens.
- 1195. Execution for deficit.
- 1196. Actions for separate liens may be joined, when and how.
- 1197. Lien does not impair right to proceed for recovery of the debt.
- 1198. Rules of practice.
- 1199. New trials and appeals.

§ 1183. Mechanics, material-men, artisans, architects and laborers of every class performing labor upon or furnishing material to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad wagon road, or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished. This lien shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party. [In effect April 15th, 1880.]

Mechanics' lien law—constitutional provision for, see Const. Cal. art. 20, sec. 15; previously held constitutional, 43 Cal. 515; 48 Cal. 175, 178; previously, statute strictly construed, 1 Cal. 183; 2 Cal. 90; 5 Cal. 249; 16 Cal. 127; 29 Cal. 283, and see ORIGINAL CONTRACT, sec. 1193n.

Mechanics' lien—nature of, 7 Cal. 389; amount of, before amdt. 1880, 7 Cal. 388; 29 Cal. 233; 36 Cal. 293, and see ORIGINAL CONTRACT, sec. 1193n.

Persons entitled to lien on property—parties performing labor, sec. 1184; 40 Cal. 185; parties furnishing material, 2 Cal. 90, 489; 3 Cal. 249; 5 Cal. 240; 23 Cal. 208; 48 Cal. 175; generally, 2 Cal. 489; 6 Cal. 455, and see sec. 1194.

Alteration—or repair, 21 Cal. 80; 49 Cal. 109.

Agent of owner—constructive, before amdt. 1880, 49 Cal. 187; Hooper v. Flood, Feb. 28th, 1880, 5 Pac. C. L. J. 30.

Lien not affected—though nothing due on original contract, amdt. 1880; previously held otherwise, see ORIGINAL CONTRACT, sec. 1193n.

§ 1184. Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills or otherwise improves the same, or the street in front of or adjoining the same, has a lien upon such lot for his work done and materials furnished.

§ 1185. The land upon which any building, improvement, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, or structure to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien. [In effect July 1st, 1874.]

Convenient space—23 Cal. 208; determined by the court, Green v. Chandler, April 22nd, 1880, 5 Pac. C. L. J. 367.

Less than a fee—49 Cal. 336.

§ 1186. The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other incumbrance of which the lien-holder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished.

Subsequent incumbrance—4 Cal. 233; 6 Cal. 402; 7 Cal. 576; 9 Cal. 119; 10 Cal. 547; 13 Cal. 54; 14 Cal. 247; 18 Cal. 570; 39 Cal. 116.

Commencement of work, etc.—7 Cal. 358, 575; 13 Cal. 54; 23 Cal. 208; 22; 44 Cal. 519.

§ 1187. Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property, or some part thereof, is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself, or of some other person. [In effect May 29th 1874.]

Strict construction—29 Cal. 283; 45 Cal. 262; 46 Cal. 637; Hooper v. Flood, Feb. 28th, 1880, 5 Pac. C. L. J. 30.

Filing claim for record—1 Cal. 183; not successive liens, 44 Cal. 18

Contents of claim—*Statement of demand*, too much, 44 Cal. 519; of several structures, sec. 1188: items unnecessary, 11 Cal. 41; 16 Cal. 140; 17 Cal. 123; 29 Cal. 283. *Credits and offsets*, 29 Cal. 283; 39 Cal. 116. *Name of owner, etc.*, 43 Cal. 515; 49 Cal. 336; Hooper v. Flood, Feb. 28th 1880, 5 Pac. C. L. J. 30. *Name of employer, etc.*, 23 Cal. 208; 45 Cal. 262; 46 Cal. 637; 49 Cal. 336. *Terms of contract, etc.*, Hooper v. Flood, Feb. 28th, 1880, 5 Pac. C. L. J. 30. *Description of the property*, 2 Cal. 60; 8 Cal. 344; 15 Cal. 507; 23 Cal. 208.

Verification of claim—sec. 446; 43 Cal. 515.

§ 1188. In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings, mining claims, or other improvements, otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated

Decree—23 Cal. 208.

§ 1189. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by

law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.

§ 1190. No lien provided for in this chapter binds any building, mining claim, improvement, or structure, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit.

Ninety days—10 Cal. 374.

Court proceedings commenced—personal action, sec. 1197; parties 10 Cal. 547; 45 Cal. 282; intervention, sec. 387; 14 Cal. 127, 165.

§ 1191. If service of summons be made by publication, the time of publication, where the defendant resides out of or is absent from the State, or for any other cause cannot be served personally, need be but once a week for four successive weeks.

Service of summons by publication—secs. 412, 413.

§ 1192. Every building or other improvement mentioned in section one thousand one hundred and eighty-three of this Code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon. [In effect May 29th, 1874.]

Construction of section—41 Cal. 583; 40 Cal. 336; 51 Cal. 423.

Constructive, instance of owner—41 Cal. 583; 49 Cal. 109.

§ 1193. The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid; and in all cases where

CODE CIV. PROC.—85.

a lien shall be filed, under this chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of such judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable. [In effect May 29th, 1874.]

Original contract—Before amdt. 1880: controls liens of contractors' employees, 23 Cal. 566; 27 Cal. 588; 36 Cal. 293; 38 Cal. 356; and balance due on, limits their liens, 16 Cal. 127; 31 Cal. 233; 49 Cal. 185; 51 Cal. 423; *Dingley v. Greene*, March 15th, 1880, 5 Pac. C. L. J. 149; where abandonment by contractor, 31 Cal. 233; 36 Cal. 293; 38 Cal. 356; 43 Cal. 478; owner's defenses, 29 Cal. 283; 48 Cal. 478; release of contractors' surety, 49 Cal. 131; *under amdt.* 1880, see sec. 1183.

§ 1194. In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens, which shall be in the following order, viz: 1st. All persons other than the original contractors and subcontractors; 2nd. The subcontractors; 3rd. The original contractors. And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and whenever, on the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages. [In effect May 29th, 1874.]

Preference—from priority, 18 Cal. 370.

Classes of liens—Generally, 6 Cal. 295. *Contractor*, 7 Cal. 575; 27 Cal. 588. *Subcontractor*, 7 Cal. 358; 16 Cal. 126; 29 Cal. 283; 36 Cal. 623. *Material-man*, see contractor, subcontractor, and 3 Cal. 64; 5 Cal. 240; 16 Cal. 126; 21 Cal. 80; 23 Cal. 208; 29 Cal. 283; 31 Cal. 233; 33 Cal. 497; 44 Cal. 519. *Laborers*, 27 Cal. 588; 33 Cal. 497.

Judgment for deficiency—44 Cal. 509; 49 Cal. 336: as in foreclosure of mortgages, sec. 726n.

§ 1195. Any number of persons claiming liens may join in the same action, and when separate actions are commenced, the court may consolidate them. The court may also allow as part of the costs, the moneys paid for filing and recording the lien, and reasonable attorney's

fee in the District and Supreme Courts. [In effect May 29th, 1874.]

Join in the same action—33 Cal. 497.

Consolidation of actions—generally, sec. 1048.

District Courts—see superseded courts, sec. 76n.

§ 1196. Whenever materials shall have been furnished for use in the construction, alteration, or repair, of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase-money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement. [In effect May 29th, 1874.]

§ 1197. Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor. [In effect July 1st, 1874.]

Personal action—attachment in, cumulative remedy, 16 Cal. 140.

§ 1198. Except as otherwise provided in this chapter, the provisions of part two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

§ 1199. The provisions of part two of this Code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

CHAPTER III.

CERTAIN LIENS FOR SALARIES AND WAGES.

§ 1204. Certain persons preferred creditors when assignment of property is made.

§ 1205. Same, against estates.

§ 1206. Same, in cases of execution or attachment.

§ 1204. In all assignments of property, made by any person to trustees or assignees, on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks, or laborers employed by such person, to the amount of one hundred dollars each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor. [In effect July 1st, 1874.]

Assignments for benefit of creditors—Civil Code, secs. 3449, 3473.

Proceedings in insolvency—see sec. 1822.

§ 1205. In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant, and laborer, for services rendered within the sixty days next preceding the death of the employer, not exceeding one hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before other claims against the estate of the deceased person. [In effect July 1st, 1874.]

Estate of deceased persons—payment of debts, generally, sec. 1643 *et seq.*

§ 1206. In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed

by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented; and claiming preference under this section, are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim, with the same rank as the original claim. [In effect July 1st, 1874.]

Execution—sec. 684: attachment, secs. 537-559.

Action to enforce lien—In Justices' Court, sec. 113, subd. 2.

TITLE V.
OF CONTEMPTS.

- § 1209. What acts or omissions are contempts.
 § 1210. Re-entry on property after eviction, when a contempt.
 § 1211. A contempt committed in the presence of the court may be punished summarily. When not so committed, an affidavit or statement shall be made.
 § 1212. A warrant of attachment may issue or a notice to show cause.
 § 1213. Bail may be given by a person arrested under such warrant.
 § 1214. Sheriff must, upon executing the warrant, arrest and detain the person until discharged.
 § 1215. Bail bond, form and conditions of.
 § 1216. Officer must return warrant and undertaking, if any.
 § 1217. Hearing.
 § 1218. Judgment and penalty, if guilty.
 § 1219. If the contempt is the omission to perform any act, the person may be imprisoned until performance.
 § 1220. If a party fail to appear, proceedings.
 § 1221. Illness sufficient cause for non-appearance of party arrested. Confinement under arrests for contempt.
 § 1222. Judgment and orders in such cases final.

§ 1209. The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;
2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;
3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service;
4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding;
5. Disobedience of any lawful judgment, order, or process of the court;
6. Assuming to be an officer, attorney, counsel of a court, and acting as such without authority;
7. Rescuing any person or property, in the custody of an officer by virtue of an order or process of such court;
8. Unlawfully detaining a witness or party to an action

while going to, remaining at, or returning from, the court where the action is on the calendar for trial;

9. Any other unlawful interference with the process or proceedings of a court;

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

12. Disobedience, by an inferior tribunal, magistrate, or officer, of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

Contempt—statute restrictive, 42 Cal. 412; 44 Cal. 475: powers of courts, secs. 128, 177, 178: in Justices' Courts, secs. 906-910.

SUBDIVISION 3. Misbehavior of attorney—sec. 287 *et seq.*

SUBDIVISION 5. Disobedience of lawful judgment or order—jurisdiction as test, 5 Cal. 494; 6 Cal. 316; 18 Cal. 60; 27 Cal. 152; 36 Cal. 552; 47 Cal. 109: alimony, 18 Cal. 60; 44 Cal. 475: by executor, sec. 1440; 53 Cal. 204: *Ex parte Cohn*, May 19th, 1880, 5 Pac. C. L. J. 409: payment of money, inability as excuse, 6 Cal. 316; 44 Cal. 475; 51 Cal. 442: ejected person resuming possession, sec. 1210.

SUBDIVISION 10. Refusal of witness to answer—7 Cal. 175, 181.

SUBDIVISION 11. Juror's non-attendance—sec. 238.

§ 1210. Every person dispossessed or ejected from, or out of, any real property, by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, re-enters into or upon, or takes possession of, any such real property, or induces or procures any person not having a right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon a conviction for such contempt, the court or justice of the peace must immediately issue an alias process, directed to the proper officer, and requiring him to restore the party entitled to the possession of such property, under the original judgment or process, to such possession.

Re-entry after dispossession—double purpose of section, 29 Cal. 632; person accused, 42 Cal. 412; subsequently acquired title, 33 Cal. 448; 52 Cal. 566.

§ 1211. When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer.

Contempt before court—Recital of facts in order, 1 Cal. 152, 187; 6 Cal. 318.

Contempt away from court—affidavit, 42 Cal. 412: attachment, sec. 1212 *et seq.*

§ 1212. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

§ 1213. Whenever a warrant of attachment is issued, pursuant to this title, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such indorsement.

§ 1214. Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

§ 1215. When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest, upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge thereupon; or they will pay, as may be directed, the sum specified in the warrant.

Undertakings—generally, sec. 941a.

§ 1216. The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

§ 1217. When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

§ 1218. Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

§ 1219. When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment.

Application to Justices' Courts—47 Cal. 131.

Imprisonment until performance of act—7 Cal. 175.

Act must be specified—7 Cal. 181.

§ 1220. When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

Undertakings, liability on—sec. 941n.

§ 1221. Whenever, by the provisions of this title, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend, is sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

§ 1222. The judgment and orders of the court or judge made in cases of contempt, are final and conclusive.

Judgment final—in probate matters, 53 Cal. 204; no appeal, 52 Cal. 506; but jurisdiction held reviewable in, 5 Cal. 494; 6 Cal. 319; 7 Cal. 175, 181; 29 Cal. 395; 42 Cal. 412; 47 Cal. 109; 53 Cal. 204.

TITLE VI.
OF THE VOLUNTARY DISSOLUTION OF
CORPORATIONS.

- § 1227. How dissolved.
- 1228. Application, what to contain.
- 1229. Application, how signed and verified.
- 1230. Filing application and publication of notice.
- 1231. Objections may be filed.
- 1232. Hearing of application.
- 1233. Judgment roll and appeals.

§ 1227. A corporation may be dissolved by the Superior Court of the county where its principal place of business is situated, upon its voluntary application for that purpose. [In effect April 16th, 1880.]

Voluntary dissolution—1 Cal. 73; 38 Cal. 166: receiver, sec. 565.

Involuntary dissolution—sec. 802 *et seq.*

§ 1228. The application must be in writing, and must set forth:

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-third vote of all the stockholders or members;

2. That all claims and demands against the corporation have been satisfied and discharged.

§ 1229. The application must be signed by a majority of the board of trustees, directors, or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.

Verification—sec. 446.

§ 1230. If the court is satisfied that the application is in conformity with this title, the judge thereof must order it to be filed with the clerk, and that the clerk give not less than thirty nor more than fifty days' notice of the application, by publication in some newspaper published in the county; and if there are none such, then by advertisements posted up in three of the principal public places in the county. [In effect April 16th, 1880.]

§ 1231. At any time before the expiration of the time of publication, any person may file his objections to the application.

§ 1232. After the time of publication has expired, the court may, upon five days' notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application, and if all the statements therein made are shown to be true, must declare the corporation dissolved. [In effect February 25th, 1878.]

Notices, service, etc.—sec. 1010 *et seq.*

§ 1233. The application, notices, and proof of publication, objections, (if there be any) and declaration of dissolution, constitute the judgment roll; and from the judgment an appeal may be taken, as from other judgments of the Superior Courts. [In effect April 16th, 1880.]

Appeals—to Supreme Court, secs. 963-966.

TITLE VII.
OF EMINENT DOMAIN.

- § 1237. Eminent domain defined.
- 1238. Purposes for which it may be exercised.
- 1239. What estates in land may be acquired by condemnation.
- 1240. Private property defined. Classes enumerated.
- 1241. Facts necessary to be found before condemnation.
- 1242. Parties may make location. May enter to make surveys.
- 1243. Jurisdiction in District Court.
- 1244. The complaint and its contents.
- 1245. Summons, what to contain. How issued and served.
- § 1246. Who may defend. What the answer may show, and how verified.
- § 1247. Court shall have jurisdiction to regulate the mode of making crossings or of enjoying a common use.
- § 1248. Court or jury to assess damages.
- § 1249. The date with respect to which compensation shall be assessed, and the measure thereof.
- § 1250. New proceedings to cure defective title.
- 1251. Payment of damages.
- 1252. Damages, to whom paid.
- § 1253. Final order of condemnation, what to contain. When filed, title vests.
- § 1254. Putting plaintiff in possession.
- 1255. Costs may be allowed, distribution thereof.
- § 1256. Rules of practice.
- 1257. New trials and appeals.
- 1258. When title takes effect, and construction of.
- 1259. When title takes effect.
- 1260. Construction.
- § 1261. Pending proceedings not affected.
- § 1262. Rules of practice.
- § 1263. Exceptions.

§ 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

Eminent domain—generally, sec. 1238*n*.

Constitutional provisions—see Const. Cal. art. 1, sec. 14; art. 12, sec. 8; art. 15, sec. 1.

Strict construction of title—13 Cal. 306; 19 Cal. 47; 24 Cal. 427; 27 Cal. 171; 36 Cal. 639; 49 Cal. 396; 50 Cal. 554.

§ 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, navy yards, navy and army stations, light-houses, range and beacon lights,

CODE CIV. PROC.—36.

coast surveys, and all other public uses authorized by the Government of the United States;

2. Public buildings and grounds for the use of the State and all other public uses authorized by the Legislature of this State;

3. Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town, or school districts; canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town; or for draining any county, incorporated city, or city and county, village, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city, or city and county, village, or town, or the inhabitants thereof, which may be authorized by the legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized;

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, steam and horse railroads; canals, ditches, flumes, aqueducts, and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable;

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also, outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines;

6. By-roads leading from highways to residences and farms;

7. Telegraph lines;

8. Sewerage of any incorporated city, or city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the State, or to any college or university. [In effect July 1st, 1874.]

Eminent domain generally—Civil Code, sec. 1001: nature of right, 18 Cal. 229; power of court, 47 Cal. 70; public necessity, 18 Cal. 229; 5 Cal. 269; compensation, sec. 1249a; 47 Cal. 536; 51 Cal. 577: enumerated uses, 51 Cal. 269.

SUBDIVISION 1. National uses—fortifications, etc., 5 Cal. 373; 16 Cal. 229; 19 Cal. 47.

SUBDIVISION 2. State uses—16 Cal. 248; 27 Cal. 171.

SUBDIVISION 3. Municipal uses—*Pueblo lands for squares,* 50 Cal. 0. *Water-works,* 53 Cal. 383. *Straightening channel of river,* 47 Cal. 6. *Opening roads,* 32 Cal. 241. *Street improvements,* 27 Cal. 613; 23 Cal. 5; 29 Cal. 75.

SUBDIVISION 4. Railroads—23 Cal. 323; 29 Cal. 112; 30 Cal. 435; 31 Cal. 367, 538; 35 Cal. 621; 41 Cal. 147; 46 Cal. 85; 47 Cal. 517; 49 Cal. 396; 53 Cal. 223.

SUBDIVISION 5. Flumes for tailings—51 Cal. 269.

SUBDIVISION 6. By-roads—32 Cal. 241.

§ 1239. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine;

2. An easement, when taken for any other use;

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, pees, and timber as may be necessary for some public use. [In effect July 1st, 1874.]

SUBDIVISION 2. Easement of corporation—19 Cal. 579.

§ 1240. The private property which may be taken under this title, includes:

1. All real property belonging to any person;

2. Lands belonging to this State, or to any county, incorporated city, or city and county, village, or town, not appropriated to some public use;

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated;

4. Franchises for toll roads, toll bridges, and ferries, and all other franchises; but such franchises shall not be taken unless for free highways, railroads, or other more necessary public use;

5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by any other right of way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall

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be made in manner most compatible with the greatest public benefit and least private injury;

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

Private property taken—refers to other property than money, 2 Cal. 345.

Rights of rival corporations—23 Cal. 323; 36 Cal. 639.

SUBDIVISION 3. More necessary public use—see sec. 1241, subd. 3.

SUBDIVISION 5. Crossings—see sec. 1247, subd. 1.

§ 1241. Before property can be taken, it must appear

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use;

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

It must appear—misrepresentations correctable, 53 Cal. 694.

SUBDIVISION 2. Taking necessary—question for jury, 50 Cal. 505.

SUBDIVISION 3. Public use—18 Cal. 229; 23 Cal. 323.

§ 1242. In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The State, or its agents in charge of such public use, may enter upon the land and make examination, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness, or malice.

State or its agents—Civil Code, sec. 1001.

§ 1243. All proceedings under this title must be brought in the Superior Court of the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon. [In effect April 26th, 1880.]

Complaint—sec. 1244: generally, sec. 426, and notes.

Summons—sec. 1245: generally, sec. 406 *et seq.*

§ 1244. The complaint must contain:

1. The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff;

2. The names of all owners and claimants of the prop

erty, if known, or a statement that they are unknown, who must be styled defendants;

3. A statement of the right of the plaintiff;

4. If a right of way be sought, the complaint must show the location, general route, and *termini*, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding;

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only part of an entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

When application for the condemnation of a right of way for the purposes of sewerage is made on behalf of a settlement, or of an incorporated village or town, the board of supervisors of the county may be named as plaintiff. [In effect April 26th, 1880.]

Contents of complaint—subd. 1, plaintiffs, 27 Cal. 171; subd. 2, equitable claimants need not be named, 51 Cal. 138; subd. 3, statement of plaintiff's right; must show futile attempt to purchase, etc., 23 Cal. 323; 1 Cal. 662.

§ 1245. The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.

Summons generally—contents, sec. 407 *et seq.*: service, sec. 410 *et seq.*

Notice to defendants—jurisdictional, 24 Cal. 427; 27 Cal. 171.

§ 1246. All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each with respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

Occupants—deemed owners, 7 Cal. 577.

Interest in the property—adverse, 47 Cal. 549.

Appearance—46 Cal. 19; generally, sec. 1014.

Plead and defend—cross-complaint, 47 Cal. 549; proceedings by rival corporations, 23 Cal. 323; 31 Cal. 215; 36 Cal. 639.

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§ 1247. The court shall have power :

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section twelve hundred and forty;

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;

3. To determine the respective rights of different parties seeking condemnation of the same property.

§ 1248. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitute only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages, so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad;

5. As far as practicable, compensation must be assessed for each source of damages separately.

Court—findings, when improper, 50 Cal. 505; judgment, vacating, Cal. 530, 558.

Jury—trial by, not essential, 16 Cal. 248; 19 Cal. 579; but see Const. Cal. art. 1, sec. 14: findings of, not to be disregarded, 50 Cal. 505.

Referee—report of commissioners, setting aside, new trial, etc., Cal. 248; 32 Cal. 530, 558; 35 Cal. 247, 621; 49 Cal. 396: not to pass on title etc., 22 Cal. 434; 29 Cal. 112.

PROVISION 1. Value of the property—sec. 1249; 35 Cal. 247; 46 Cal. 515; 49 Cal. 139.

PROVISION 2. Severance, damages from—41 Cal. 256; 50 Cal. 90.

PROVISION 3. Benefits—31 Cal. 367; 32 Cal. 530; 41 Cal. 356; 46

PROVISION 4. Fences—6 Cal. 74; 33 Cal. 230.

PROVISION 5. Assessing compensation separately—48 Cal. 536.

249. For the purpose of assessing compensation damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages for property not actually taken but injuriously affected, in cases where such damages are allowed as provided in section twelve hundred and forty-eight. If an order of sale letting the plaintiff into possession, as provided in section twelve hundred and fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages.

Compensation—on condemnation: generally, 3 Cal. 69; 4 Cal. 414; 14 Cal. 153, 243; 18 Cal. 229; 19 Cal. 47; 22 Cal. 251, 434; 23 Cal. 427; 27 Cal. 171, 613; 28 Cal. 345, 662; 31 Cal. 215, 406; 32 Cal.

damages—when not special, 50 Cal. 90.

250. If the title attempted to be acquired is found defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed.

251. The plaintiff must, within thirty days after judgment, pay the sum of money assessed; but may, at any time of or before payment, elect to build the fences and cattle guards, and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court, in double the assessed cost of the same, to build the fences and cattle guards within eighteen months from the time the railroad is built on the land taken, and such bond be given, need not pay the cost of such fences and cattle guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

252. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the

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defendants may have execution as in civil cases, and the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

Payment made—to whom, 6 Cal. 639.

§ 1253. When payments have been made, and a bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned, and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

§ 1254. At any time after trial and judgment entered or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff shall have paid into court for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the Superior Court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff already in possession, to continue therein, and, if not then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses in the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, except

claim for greater compensation. In ascertaining the amount to be paid into court, the court has the care that the same be sufficient and adequate. Payment of the money in court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; the money shall be and remain, as to all accidents, losses, or other contingencies, (as between the parties to the proceedings) at the risk of the plaintiff, and shall remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as may be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or be abstracted, or withdrawn, through no fault of the defendant, the court shall require the plaintiff to keep the sum good at all times until the litigation is finally brought to an end, and until paid over or delivered to the defendant by order of court, as above provided; and until such time or times the county clerk shall be deemed to be the custodian of the money, and shall be liable to the plaintiff upon his official bond for the same, or any part thereof, in case it be for any reason otherwise abstracted or withdrawn. The court shall order the money to be deposited in the State treasury, and in such case it shall be the duty of the State treasurer to receive all such moneys, duly receipt for and to keep the same in a special fund, to be entered on the books as a condemnation fund for such purpose, and the duty he shall be liable to the plaintiff upon his official bond. The State treasurer shall pay out such moneys so deposited in such manner and at such times as may be ordered by the court or a judge thereof may, by order or decree.

In all cases where a new trial has been granted upon the application of the defendant, and he has failed to obtain a new trial, or to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him. [In effect April 26th, 1880.]

Compensation before possession—required by Const. 1879, see Const. art. 1, sec. 14, and *Lamb v. Schottler*, March 17th, 1880, 5 Cal. 140; previous accordant rulings, 4 Cal. 116; 7 Cal. 121, 577; 12 Cal. 500; 13 Cal. 306; 14 Cal. 106; 29 Cal. 112; 44 Cal. 52; 47 Cal. 284; 51 Cal. 255; 53 Cal. 208; *contra*, 31 Cal. 633; section 78, providing for security as compensation, held unconstitutional, 53 Cal. 208.

55. Costs may be allowed or not, and if allowed, shall be apportioned between the parties on the same or otherwise, at the discretion of the court.

§ 1256. Except as otherwise provided in this title, provisions of part two of this Code are applicable to constitute the rules of practice in the proceedings mentioned in this title.

Adjournments—do not divest jurisdiction, 27 Cal. 171.

Vacating incidental orders—In eminent domain, 47 Cal. 70.

Jury—to pass on need of taking, 50 Cal. 505.

§ 1257. The provisions of part two of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; *provided*, that upon the payment of the sum of money assessed, and upon execution of the bond to build the fences and catwalks and guards, as provided in section twelve hundred and fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned, (if not already in possession, as provided in section twelve hundred and fifty-four) and devote the same to the public use in question; and no motion for a new trial or appeal shall, after such payment and filing of such bond, as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section twelve hundred and fifty-four, may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff. [In effect April 1st, 1878.]

New trials—see REFEREE, report of commissioners, setting aside, etc., under sec. 1248n.

Appeal—from proceedings for condemnation of land, 29 Cal. 111; Cal. 133.

§ 1258. With relation to the acts passed at the present session of the Legislature, this title must be construed in the same manner as if this Code had been passed on the last day of this session, and from and after the time this Code takes effect, all laws of this State in relation to the taking of private property for public uses are abolished, and all proceedings had in the exercise of the power of eminent domain must conform to the provisions of this title.

§ 1259. Title seven of part three of the Code of Civil Procedure of the State of California (this title) shall be in force and effect from and after the fourth day of April, one thousand eight hundred and seventy-two.

Section added—by Act of April 1st, 1872; same applies to remaining sections of this title.

260. From and after the time this title takes effect, it shall be construed in the same manner as it would be if it were sections four and seventeen of this Code in force and effect.

261. No proceeding to enforce the right of eminent domain commenced before this title takes effect, is affected by the provisions of this title.

262. Until the first day of January, one thousand nine hundred and seventy-three, at twelve o'clock noon, the provisions of sections twelve hundred and fifty-six and twelve hundred and fifty-seven of this title are suspended; and until then, except as otherwise provided in this title, the rules of pleading and practice in civil actions now in force in this State are applicable to the proceedings mentioned in this title, and constitute the rules of pleading and practice therein.

263. Nothing in this Code must be construed to create or repeal any statute providing for the taking of eminent domain in any city or town for street purposes.

TITLE VIII.

OF ESCHEATED ESTATES.

- 1. Manner of commencing proceedings relative to escheated estates.
- 2. Receiver of rents and profits may be appointed.
- 3. Appearance, pleadings, and trial.
- 4. Proceedings by persons claiming escheated estates.

1269. When the attorney-general is informed that real estate has escheated to this State, he must file information in behalf of the State in the Superior Court of the county in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last seized, the name of the occupant of the estate, the name of the person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by virtue thereof, the State of California has right by law to the estate. Upon such information, a summons must be served on such person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order setting forth the contents of the information, and requiring all

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persons interested in the estate to appear and show cause if any they have, within forty days from the date of order, why the same should not vest in this State; and order must be published for at least one month from the date thereof, in a newspaper published in the county, one be published therein, and in case no newspaper published in the county, in some other newspaper in the State. [In effect April 16th, 1880.]

Unclaimed realty—of non-resident aliens, escheats to State, Code, sec. 672; 5 Cal. 373; 13 Cal. 159; My. P. Rep. 19.

Non-resident aliens—rights generally, 2 Cal. 558; 5 Cal. 373, Cal. 250; 12 Cal. 450; 13 Cal. 159; 18 Cal. 217; 26 Cal. 455; 32 Cal. 376.

§ 1270. The court, upon the information being filed, and upon the application of the attorney-general, either before or after answer, upon notice to the party claiming such estate if known, may, upon sufficient cause there being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled.

Appoint a receiver—see generally, secs. 564-569.

§ 1271. All persons named in the information filed, shall appear and answer, and may traverse or deny the title stated in the information, the title of the State to land and tenements therein mentioned, at any time before the time for answering expires, and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose in open court within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered, that the State be seized of the lands and tenements in such information claimed. But if any person appears and deny the title set up by the State, or traverses any material fact set forth in the information, the issue of title must be tried as issues of facts are tried in civil actions. If, after the issues are tried, it appears from the evidence found or admitted that the State has good title to the land and tenements in the information mentioned, in whole or in part thereof, judgment must be rendered that the same be seized thereof, and recover costs of suit against the defendants. In any judgment rendered, or that has heretofore been rendered by any court of competent jurisdiction, escheating real property to the State, on motion of the attorney-general, the court shall make an order that the said real property be sold by the sheriff of the county where the same is situate, at public sale, for gold, after giving such notice of the time and place of sale

to be prescribed by the court in the said order; that the sheriff shall, within five days after such sale, make a report thereof to the court, and upon the hearing of said report, the court may examine the said report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and it appear that a sum exceeding such bid at least ten per cent., exclusive of the expense of a new sale, may be obtained, the court may vacate the sale, and direct another sale to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent. more in amount than that named in the report be made to the court in writing, by a responsible person, the court may, in its discretion, accept such offer, and confirm the sale to such person, or order a new sale. If it appears to the court that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent., exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned be made and accepted by the court, the court must make an order confirming the sale, and directing the sheriff, in the name of the State, to execute to purchaser or purchasers a conveyance of said property sold; and said conveyance shall vest in the purchaser or purchasers all the right and title of the State therein, and the sheriff shall, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the State, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court, not exceeding ten per cent. on the amount of such sale, and the residue thereof shall be paid by said sheriff into the State treasury. [In effect March 2nd, 1881.]

Proceedings—appearance, sec. 1014 and note; answer, sec. 437 and notes; judgment, secs. 585, 664, and notes; trial, secs. 600-645; issue of fact, secs. 590, 592; costs, sec. 1021 *et seq.*

§ 1272. Within twenty years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the Superior Court of the County of Sacramento, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the attorney-general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the

property, or the proceeds thereof, it must order the erty, if it has not been sold, to be delivered to him it has been sold and the proceeds paid into the treasury, then it must order the controller to dra warrant on the treasury for the payment of the sam without interest or cost to the State, a copy of whi der, under the seal of the court, shall be a suffi voucher for drawing such warrant. All persons wh to appear and file their petitions within the time li are forever barred; saving, however, to infants, ma women, and persons of unsound mind, or persons be the limits of the United States, the right to appea file their petitions at any time within the time limit five years after their respective disabilities cease. effect April 16th, 1880.]

Non-resident aliens—unclaimed realty of, and rights general 1269, notes.

TITLE IX.

OF CHANGE OF NAMES.

1275. Jurisdiction.
1276. Application for change of name, how made.
1277. Publication of petition for.
1278. Hearing of application and remonstrance.
1279. Return by county clerk.

75. Applications for change of names must be determined by the Superior Courts. [In effect April 23rd, 1880.]

76. All applications for change of names must be made to the Superior Court of the county where the person whose name is proposed to be changed resides, by or for such person; and if such person is under the age of twenty-one years of age, if a male, and under the age of sixteen years, if a female, by one of the parents, if living; if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petitioner must specify the place of birth and residence of the person, his or her present name, the name proposed, and the reason for such change of name, and must, if the person of such person be not living, name, as far as known, the petitioner, the near relatives of such person, and the place of residence. Any religious, benevolent, literary or scientific corporation, or any corporation bearing its name, or using or being known by the name of any benevolent, or charitable order or society, by petition, apply to the Superior Court of the county where the property of said corporation is situated, for a change of its corporate name. Such petition must be signed by the trustees of the corporation, or by a majority of them, and must specify the date of the formation of the corporation, its present name, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be had as upon applications for changes of names of natural persons; and no banking corporation or other organized shall adopt or use the name of any other society. [In effect April 23rd, 1880.]

77. A copy of such petition must be published for successive weeks, in some newspaper printed in the

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county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such petition must be posted at three of the most public places in the county for a like period, and proofs must be made of such publication before the petition can be considered.

§ 1278. Such application must be heard at such time as the court may appoint, and objections may be filed by any person who can, in such objections, show to the satisfaction of the court a good reason against such change of name. On the hearing, the court may examine on oath any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name, or dismissing the application, as to the court may seem reasonable and proper. [In effect April 23rd, 1880.]

§ 1279. Each county clerk shall, annually, in the first month of January, make a return to the office of the Secretary of State of all changes of names made in the Superior Court of his county under this title. Such returns shall show the date of the decree of the court, original name, name decreed, and residence. Such returns shall be published in a tabular form with the statutes first published thereafter. [In effect April 23rd, 1880.]

TITLE X OF ARBITRATIONS.

What may be submitted to arbitration, and when.
Submission to arbitration to be in writing.
Submission may be entered as an order of the court. Revocation.

Powers of arbitrators.

Majority of arbitrators may determine any question. They must be sworn.

Award to be in writing. When judgment to be entered.

Award may be vacated in certain cases.

Court may, on motion, modify or correct the award.

Decision, on motion, subject to appeal, but not the judgment entered before motion.

If submission be revoked and an action brought, what to be recovered.

1281. Persons capable of contracting may submit to arbitration any controversy which might be the subject of civil action between them, except a question of title to property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

Submission—statute construed, 4 Cal. 1, 205.

Submission to arbitration—discontinuance of cause by, 1 Cal. 45; revocative effect of, 3 Cal. 43; by partner, 5 Cal. 345.

Controversy actionable—else no basis for submission, 52 Cal. 159.

Submission to real property—question of, 21 Cal. 317; 42 Cal. 473; 52 Cal. 159; partition, 23 Cal. 275.

1282. The submission to arbitration must be in writing, and may be to one or more persons.

Submission in writing—penalty in, 23 Cal. 275; stipulation against award, 2 Cal. 74; when award authorized by, 21 Cal. 317; distinguished from reference, 4 Cal. 1.

Submission by one or more persons—three arbitrators, majority acting, sec. 1285; see, 1053.

1283. It may be stipulated in the submission that it shall be entered as an order of the Superior Court, for which case it must be filed with the clerk of the county in which the parties, or one of them, reside. The clerk shall thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within

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which the award must be made. When so entered, submission cannot be revoked without the consent both parties. The arbitrators may be compelled by court to make an award, and the award may be enforced by the court in the same manner as a judgment. If submission is not made an order of the court, it may be revoked at any time before the award is made. [In effect April 15th, 1880.]

Order of court—submission made, by stipulation, 14 Cal. 390; 30 Cal. 218; 42 Cal. 125: but court must have jurisdiction, 9 Cal. 142.

Register of actions—generally, sec. 1053: entry and authority, Cal. 218: 43 Cal. 393.

§ 1284. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and defenses of the parties, and to make an award thereon.

Umpire before hearing—23 Cal. 365.

Make an award thereon—time governed by submission, 30 Cal.

§ 1285. All the arbitrators must meet and act together during the investigation; but when met, a majority must determine any question. Before acting, they must be sworn before an officer authorized to administer oaths faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matter in controversy, and to make a just award according to their understanding.

Majority acting—sec. 1053.

Just award—when set aside for illegality, 2 Cal. 74.

§ 1286. The award must be in writing, signed by all arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of court, the award must be filed with the clerk, and a copy thereof made in his register. After the expiration of ten days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party, his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

Award, extent of—7 Cal. 312; 12 Cal. 331; 37 Cal. 197.

Delivered to the parties—afterward, no change or correction, 2 Cal. 322; 7 Cal. 312; 23 Cal. 365.

After five days—on filing affidavit, 31 Cal. 128.

Entering judgment on award—1 Cal. 45; 4 Cal. 3; 14 Cal. 390.

87. The court, on motion, may vacate the award either of the following grounds, and may order a hearing before the same arbitrators, or not, in its discretion:

That it was procured by corruption or fraud; that the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to hold the hearing, or in refusing to hear pertinent evidence or otherwise acted improperly, in a manner by which the rights of the party were prejudiced; that the arbitrators exceeded their powers in making the award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

Final and conclusive—except as stated in section, 1 Cal. 45; and see

Reversing award, grounds for—Subd. 1, fraud, mistake, or accident, 1 Cal. 122; 4 Cal. 122, 205; 14 Cal. 390. Subd. 2, misconduct, 4 Cal. 205; 12 Cal. 28; contrary to law and evidence, 14 Cal. 390. Subd. 3, in excess of powers, 21 Cal. 317; indefinite, 2 Cal. 599; 12 Cal. 331; 14 Cal. 390; 17.

88. The court may, on motion, modify or correct the award, where it appears:

That there was a miscalculation in figures upon which the award was made, or that there is a mistake in the description of some person or property therein;

When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;

When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

Reversing or correcting award—Subd. 2, partially good, 2 Cal. 74; 2.

89. The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before the motion made cannot be subject to appeal.

Power to vacate or modify award—secs. 1287, 1288; 38 Cal. 286.

Final orders—sec. 939 and notes.

90. If a submission to arbitration be revoked, and a new submission be brought therefor, the amount to be recovered shall only be the costs and damages sustained in preparing for and attending the arbitration.

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TITLE XI.

Of Proceedings in Probate Court.

- CHAP. I. Of jurisdiction. §§ 1294-1295.
II. Of the probate of wills. §§ 1298-1346.
III. Of executors and administrators, their letters, bonds, removals, and suspensions. §§ 1347-1440.
IV. Of the inventory and collection of the assets of decedents. §§ 1443-1461.
V. Of the provisions for support of family, and of the homestead. §§ 1464-1486.
VI. Of claims against the estate. §§ 1490-1513.
VII. Of sales and conveyance of property of decedents. §§ 1516-1576.
VIII. Of the powers and duties of executors and administrators, and of the management of decedent's estates. §§ 1581-1591.
IX. Of the conveyance of real estate by executors and administrators in certain cases. §§ 1597-1607.
X. Of accounts rendered by executors and administrators, and of the payment of debts. §§ 1612-1653.
XI. Of the partition, distribution, and final settlement of estates. §§ 1658-1698.
XII. Of orders, decrees, process, minutes, records, and appeals. §§ 1704-1722.
XIII. Of public administrator. §§ 1726-1743.
XIV. Of guardian and ward. §§ 1747-1809.

CHAPTER I. OF JURISDICTION.

Jurisdiction of Probate Court over the estate, when exercised. When jurisdiction decided by first application.

1294. Wills must be proved, and letters testamentary of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have

2. In the county in which the decedent may have died, if his estate therein, he not being a resident of the

3. In the county in which any part of the estate may have been in the decedent having died out of the State, and not in any county thereof at the time of his death;

4. In the county in which any part of the estate may have been in the decedent not being a resident of the State, and not in any county thereof at the time of his death;

5. In all other cases, in the county where application for letters is first made.

Probate matters—jurisdiction of Superior Courts in, sec. 76, subd. 4: of Probate Courts, see under SUPERSEDED COURTS, sec. 76a.

PROVISION 1. County of decedent's residence—7 Cal. 215; 10 Cal. 17; 17 Cal. 233; 24 Cal. 182; Estate of Tittel, My. P. Rep. 97; 228,

PROVISION 5. County where application first made—see sec.

1295. When the estate of the decedent is in more than one county, he having died out of the State, and not being a resident thereof at the time of his death, and dying such non-resident, and dying within the State, and leaving estate in the county where he died, the Superior Court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate. [Act April 16th, 1880.]

County where application first made—court of, has exclusive jurisdiction. 15 Cal. 220.

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CHAPTER II.
OF THE PROBATE OF WILLS.

- ART. I. PETITION, NOTICE, AND PROOF.
- II. CONTESTING PROBATE OF WILL.
- III. PROBATE OF FOREIGN WILLS.
- IV. CONTESTING WILL AFTER PROBATE.
- V. PROBATE OF LOST OR DESTROYED WILL.
- VI. PROBATE OF NUNCUPATIVE WILLS.

ARTICLE I.

PETITION, NOTICE, AND PROOF.

- § 1298. Custodian of will to deliver same, to whom. Penalty.
- § 1299. Who may petition for probate of will.
- § 1300. Contents of petition.
- § 1301. When executor forfeits right to letters.
- § 1302. Will to accompany petition, or its presentation prayed for how enforced.
- § 1303. Notice of petition for probate, how given.
- § 1304. Heirs and named executors to be notified, how.
- § 1305. Petition may be presented to judge at chambers, and judge may do.
- § 1306. Hearing proof of will after proof of service of notice.
- § 1307. Who may appear and contest the will.
- § 1308. Probate, when no contest.
- § 1309. Olographic wills.

§ 1298. Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the Superior Court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby. [In effect April 16th, 1880.]

Delivery of will by custodian—jurisdictional significance of will, 22 Cal. 397.

§ 1299 Any executor, devisee, or legatee named in a will, or any other person interested in the estate, may at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the State, or nuncupative will.

Petition—not essential to jurisdiction, 22 Cal. 395: presumption where missing, 22 Cal. 51.

300. A petition for the probate of a will must show:
 the jurisdictional facts;

Whether the person named as executor consents to
 or renounces his right to letters testamentary;

The names, ages, and residence of the heirs and
 of the decedent, so far as known to the peti-

tioner;
 The probable value and character of the property of
 the estate;

The name of the person for whom letters testamentary
 are prayed.

A defect of form, or in the statement of jurisdictional
 facts actually existing, shall make void the probate of a
 will.

[In effect July 1st, 1874.]

Section on probate of will—

PROVISION 1. Jurisdictional facts—10 Cal. 110, and see note

PROVISION 3. Residence—as a jurisdictional requirement, My.
 188, 228, 237; 19 Cal. 188; 26 Cal. 397.

Jurisdictional facts existing—absence or defect of petition imma-
 ture—2 Cal. 51, 397.

301. If the person named in a will as executor, for
 ten days after he has knowledge of the death of the
 testator, and that he is named as executor, fails to peti-
 tion the proper court for the probate of the will, and that
 no letters testamentary be issued to him, he may be held to
 have renounced his right to letters, and the court may
 appoint any other competent person administrator, unless
 some cause for delay is shown.

Failure of executor to petition—does not affect jurisdiction, 22 Cal.

302. If it is alleged in any petition that any will is
 in the possession of a third person, and the court is satis-
 fied that the allegation is correct, an order must be issued
 compelling the person having possession of the will,
 to bring it to the court at a time named in the order.
 If he has possession of the will, and neglects or refuses to
 produce it in obedience to the order, he may, by warrant
 of the court, be committed to the jail of the county,
 and be kept in close confinement until he produces it.

Warrant orders and citations—secs. 1704-1711.

Imprisonment until order obeyed—sec. 1219.

303. When the petition is filed and the will pro-
 duced, the clerk of the court must set the petition for
 trial by the court upon some day not less than ten nor
 more than thirty days from the production of the will.

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Notice of the hearing shall be given by such clerk by publishing the same in a newspaper of the county; if there none, then by three written or printed notices posted in three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear thereon at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting it must be given at least ten days before the hearing. [Approved March 3rd, 1881.]

Production of will—initiates jurisdiction, 22 Cal. 395.

Order directing publication—particularity of, 51 Cal. 146.

Publication of notice—sec. 1705; 39 Cal. 550: where defective, proceedings vacated, My. P. Rep. 75: order for, need not direct number of insertions, 51 Cal. 146.

§ 1304. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the State, at their places of residence if known to the petitioner, and deposited in the post-office, with the postage thereon prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them and deposited in the post-office at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as coexecutor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing. [In effect July 1st, 1874.]

Notice to heirs—record must show, 44 Cal. 366; My. P. Rep. 130.

Notice to coexecutor—residence must appear, 51 Cal. 146.

Citation not served—effect of, on jurisdiction, 14 Cal. 103.

§ 1305. A judge of the Superior Court may at any time receive petitions for the probate of wills, and make and issue all necessary orders and writs, to enforce the production of wills, and the attendance of witnesses, and may appoint special sessions of his court for hearing petitions, trials of issue, and admitting wills to probate. [In effect April 16th, 1880.]

Probate powers at chambers—sec. 165.

Probate orders and processes—sec. 1704 *et seq.*
 Probate sessions—terms formerly, see sec. 73n.

306. At the time appointed for the hearing, or the time to which the hearing may have been postponed, the parties, unless the parties appear, must require proof that notice has been given, which being made, the court may hear testimony in proof of the will. [In effect July 1, 1874.]

Who appointed for the hearing—22 Cal. 51.
 Time of notice—to heirs of estate, 5 Cal. 70; 49 Cal. 599; My. P. Rep.

Testimony in proof of the will—secs. 1308, 1309, 1315, 1316.

307. Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so appointed, if commenced within the time provided in section four of this chapter; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will. [In effect July 1st, 1874.]

Waiver—sec. 1312 *et seq.*: acquiescence as bar, 6 Cal. 153.

Guardians—secs. 372, 378, 1747-1809.

Attorneys—generally, secs. 275-299.

Attorney appointed by the court—sec. 1718; My. P. Rep. 6; Estate of *Whigham*, No. 6590, from the Bench, March 11th, 1880, 5 Pac. C. L.

308. If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

Who admitted to probate—where contest, secs. 1314, 1317, 1318: conclusiveness of, sec. 1908, subd. 1; 20 Cal. 233; 22 Cal. 72.

Will was executed—proof of execution of writing, sec. 1940.

309. An olographic will may be proved in the same manner that other private writings are proved.

Olographic will—signature to, My. P. Rep. 5, 78, 140.

Private writings, how proved—sec. 1940.

CODE CIV. PROC.—38.

STATE OF CALIFORNIA
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ARTICLE II.

CONTESTING PROBATE OF WILLS.

- § 1312. Contestant to file grounds of contest, and petitioner to reply.
- § 1313. How jury obtained and trial had.
- § 1314. Verdict of the jury. Judgment. Appeal.
- § 1315. Witnesses, who and how many to be examined. Proof of handwriting admitted, when.
- § 1316. Testimony reduced to writing for future evidence.
- § 1317. If proved, certificate to be attached.
- § 1318. Will and proof to be filed and recorded.

§ 1312. If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in part two, title six, chapter three of this Code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving

1. The competency of the decedent to make a last will and testament;
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or
4. Any other questions substantially affecting the validity of the will—

Must, on request of either party in writing, (filed ten days prior to the day set for the hearing) be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant.

Contestants—sec. 1307.

Contest—before probate, does not involve construction of will. Cal. 599; after probate, sec. 1327 *et seq.*: through attorney appointed by the court, sec. 1307 and note.

Grounds of opposition—

SUBDIVISION 1. Competency—Estate of Toomes, April 7th, 1890, 5 Pac. C. L. J. 236; My. P. Rep. 12, 135.

SUBDIVISION 2. Undue influence—52 Cal. 465; Estate of Brown, March 31st, 1890, 5 Pac. C. L. J. 236; My. P. Rep. 1, 13, 50, 141, 143: various grounds, My. P. Rep. 12, 24: facts to be stated, My. P. Rep. 205.

SUBDIVISION 3. Execution—see sec. 1315.

ends of demurrer—secs. 430-434: specifying, My. P. Rep. 259.
 instant plaintiff—must open proofs, My. P. Rep. 73.

313. When a jury is demanded, the Superior Court impanel a jury to try the case, in the manner proper for impanneling trial juries in courts of record; and trial must be conducted in accordance with the provision of part two, title eight, chapter four, of this Code. Trial by the court must be conducted as provided in part title eight, chapter five, of this Code. [In effect 16th, 1880.]

juries—in courts of record, summoning, secs. 225-228: impan-
 secs. 246, 247.

duct of trial—sec. 607n; secs. 600-628.

by the court—secs. 631-636.

transfer of proceeding—secs. 397, 398, 1431-1433; 46 Cal. 245.

314. The jury, after hearing the case, must return special verdict upon the issues submitted to them by the court; upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will is admitted to probate, the judgment, will, and proofs must be reduced to writing.

Special verdict—conclusiveness of, sec. 1317; 34 Cal. 687: verdict
 orally, secs. 624-628.

Reduction of the court—need not be formal, 22 Cal. 51.

Proofs reduced to writing—see sec. 1316.

315. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the sanity, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for the trial of the will, the court may admit the testimony of witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator and the signatures of the subscribing witnesses, or any of them.

Witnesses—proof of execution, sec. 1940.

Attendance of witnesses—generally, sec. 1878-1884: attendance of, procuring, sec. 1884.
seq.

316. The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will,

STATE OF NEW YORK

or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this State.

§ 1317. If the court is satisfied, upon the proof taken or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the will. [In effect April 16th, 1880.]

Certificate attached to will—directory merely, 22 Cal. 51.

Seal required—sec. 153, subd. 2.

§ 1318. The will, and a certificate of the proof thereof must be filed and recorded by the clerk, and the same when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony shall be filed by the clerk. [In effect April 15th, 1880.]

Constitute part of record, etc.—inserted by amdt. 1880.

ARTICLE III.

PROBATE OF FOREIGN WILLS.

§ 1322. Wills proved in other States to be recorded, when and where

§ 1323. Proceedings on the production of a foreign will.

§ 1324. Hearing proofs of probate of foreign will.

§ 1322. All wills duly proved and allowed in any other of the United States, or in any foreign country or State, may be allowed and recorded in the Superior Court of any county in which the testator shall have left an estate. [In effect April 16th, 1880.]

§ 1323. When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will.

Foreign executor—no extra-territorial authority, see sec. 1913.

Notice as for an original petition—see sec. 1303 *et seq.*: application of special statute, 39 Cal. 550.

Attorney for absent heirs—sec. 1718.

§ 1324. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed accord-

to the law of the place in which the same was made, which the testator was at the time domiciled, or in conformity with the laws of this State, it must be admitted to probate and have the same force and effect as if first admitted to probate in this State, and letters testamentary or of administration issued thereon.

Admitted to probate—effect of judgment, 22 Cal. 72.

Letters testamentary or of administration—secs. 1349-1362.

ARTICLE IV.

CONTESTING WILL AFTER PROBATE.

The probate may be contested within one year.

Citation to be issued to parties interested.

The hearing had on proof of service.

Petitions to revoke probate of will tried by jury or court.

Judgment, what.

On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith.

Costs and expenses, by whom paid.

Probate, when conclusive. One year after removal of disability given to infants and others.

1327. When a will has been admitted to probate, person interested may, at any time within one year of such probate, contest the same or the validity of the will.

For that purpose he must file in the court in which the will was proved, a petition in writing, containing his objections against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

Contest within one year after probate—Estate of Cunningham, My. P. Rep. 255; appeal, 5 Pac. C. L. J. 515; My. P. Rep. 255: if no contest, probate conclusive, sec. 1333.

Contribution proper before end of year—51 Cal. 568; 53 Cal. 94.

Counsel appointed by the court—powers as to proceedings for revocation, My. P. Rep. 6, 75.

Citation for revocation—My. P. Rep. 250: allegations against validity of will, see sec. 1312.

1328. Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the county, so far as known to the petitioner; or to their guardians, if any of them are minors; or to their personal representatives, if any of them are dead; requiring them to appear before the court on some day of a regular term, to be specified, to show cause why the probate of the will should not be revoked. [In effect July 1st, 1874.]

Contest—see secs. 1707-1711.

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Guardians—sec. 1722; sec. 1747 *et seq.*

Regular term—abolition of terms, sec. 73a.

§ 1329. At the time appointed for showing cause, or any time to which the hearing is postponed, personal service of the citations having been made upon any person named therein, the court must proceed to try the issue of fact joined in the same manner as in an original contest of a will.

Proof of notice—see sec. 1306.

Try the issues joined—see sec. 1312; *Estate of Cunningham*, March 11th, 1880, 5 Pac. C. L. J. 515.

§ 1330. In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs presented by the parties, the jury shall find, or if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.

Jury—trial by, secs. 1313, 1314.

§ 1331. Upon the revocation being made, the power of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

Acts before revocation, valid—sec. 1428.

§ 1332. The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

Costs of contest—costs generally, sec. 1021 *et seq.*

§ 1333. If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed. [In effect July 1st, 1874.]

Conclusiveness of probate—sec. 1908, subd. 1 and notes; 20 Cal. 2

Coverture not a disability—My. P. Rep. 19.

Distribution need not be postponed—for those under disabilities 52 Cal. 94.

ARTICLE VI.

THE PROBATE OF NUNCUPATIVE WILLS.

- § 1344. Nuncupative wills, when and how admitted to probate.
§ 1345. Additional requirements in probate of nuncupative wills.
§ 1346. Contests and appointments to conform to provisions as to wills.

§ 1344. Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in article one, chapter two, of this title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

Nuncupative wills—Civil Code, secs. 1288-1291: under the present system, 1 Cal. 488.

Petition and notice—secs. 1298-1309.

§ 1345. The Superior Court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, unless such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife, (if any) and all other persons interested in the State or county interested in the estate have been notified as hereinbefore provided. [In effect April 1, 1880.]

Notifying persons interested—see sec. 1338n.

§ 1346. Contests of the probate of nuncupative wills and appointments of executors and administrators of an estate devised thereby, must be had, conducted, and decided as hereinbefore provided in cases of the probate of wills.

Probate contests—sec. 1312 *et seq.*; sec. 1327 *et seq.*

Contesting appointment of executors, etc.—secs. 1351, 1374.

CHAPTER III.

EXECUTORS AND ADMINISTRATORS,
THEIR LETTERS, BONDS, REMOVALS,
AND SUSPENSIONS.

LETTERS TESTAMENTARY AND OF ADMINISTRATION,
WITH THE WILL ANNEXED, HOW AND TO WHOM
ISSUED.

FORM OF LETTERS.

LETTERS OF ADMINISTRATION, TO WHOM AND THE
ORDER IN WHICH THEY ARE GRANTED.

PETITION AND CONTEST FOR LETTERS, AND ACTION
THEREON.

REVOCAION OF LETTERS AND PROCEEDINGS THERE-
FOR.

OATHS AND BONDS OF EXECUTORS AND ADMINISTRA-
TORS.

SPECIAL ADMINISTRATORS AND THEIR POWERS AND
DUTIES.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION
GRANTED.

DISQUALIFICATION OF JUDGES AND TRANSFERS OF
ADMINISTRATION.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

ARTICLE I.

TESTAMENTARY AND OF ADMINISTRATION, WITH THE
WILL ANNEXED, HOW AND TO WHOM ISSUED.

whom letters on proved will to issue.

who are incompetent as executors or administrators. Letters
with will annexed to issue, when.

interested parties may file objections.

unmarried woman executrix or administratrix marrying, her
authority ceases. Married woman named may be execu-
trix, but not administratrix.

executor of an executor.

letters of administration *durante minore etate*.

parts of a portion of executors valid.

authority of administrators with will annexed. Letters, how
issued.

9. The court admitting a will to probate, after
it is proved and allowed, must issue letters
to the persons named therein as executors who
are competent to discharge the trust, who must appear
in person, unless objection is made as provided in sec-
tion ten hundred and fifty-one.

Letters testamentary—form of, sec. 1360: when not ordered to issue,
issued to persons not authorized, are void, 52 Cal. 658.

§§ 1350-4 EXECUTORS AND ADMINISTRATORS.

Qualification of executors—secs. 1387-1407: powers before Code, sec. 1373.

§ 1350. No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court incompetent to execute duties of the trust by reason of drunkenness, imbecility, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to apply and qualify, letters of administration, with the will annexed, must be issued as designated and provided for in the grant of letters in cases of intestacy. [Approved Act of 1878.]

Incompetent to serve as executors—subd. 1, minor, see sec. 1350; subd. 3, want of integrity, My. P. Rep. 117.

Some of executors unable to act—sec. 1354.

Marriage—as affecting competency, sec. 1352.

Letters of administration with will annexed—sec. 1356.

§ 1351. Any person interested in a will may file objections in writing, to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court. A petition may, at the same time, be filed for letters of administration with the will annexed.

Letters of administration with will annexed—sec. 1356.

§ 1352. When an unmarried woman, appointed executrix, marries, her authority is extinguished. When a married woman is named as executrix, she may be appointed and serve in every respect as a *femme sole*.

Unmarried woman—appointed executrix, marries, 18 Cal. 2d 462.

Married woman—not to be administratrix, sec. 1370.

§ 1353. No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of the last will, letters of administration with the will annexed of the estate of the first testator, left unadministered, must be issued.

Executor of an executor—claim cannot be presented to; 52 Cal. 2d 462.

Letters of administration with will annexed—sec. 1356.

§ 1354. Where a person absent from the State, or a minor, is named executor—if there is another executor who accepts the trust and qualifies—the latter may

EXECUTORS AND ADMINISTRATORS. §§ 1355-60

testamentary and administer the estate until the death of the absentee or the majority of the minor, who shall then be admitted as joint executor. If there is no executor, letters of administration with the will annexed must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority.

1355. When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all appointed and should act together; where there are no executors or administrators, the act of one alone shall be as effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his coexecutor or coadministrator authority in writing, to act for both; and where there are more than one executor or administrators, the act of a majority is

binding on all executors acting—where some incapacitated, etc.,

executor not acting—not entitled to show of commissions, 24

authority—sec. 15.

authority of executors—before qualifying, Civil Code, sec. 1373: before letters revoked, sec. 1428: powers, etc., generally, sec. 1581 *et seq.*: letters, etc., sec. 1436 *et seq.*

1356. Administrators with the will annexed have the same authority over the estates which executors would have in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the majority of the court, and bear the seal thereof.

authority of executors—sec. 1355n.

administrators with the will annexed—same power as executor, sec. 1356: may maintain conversion, 29 Cal. 507.

ARTICLE II.

FORM OF LETTERS.

1360. Form of letters testamentary.

1361. Form of letters of administration with the will annexed.

1362. Form of letters of administration.

1360. Letters testamentary must be substantially in the following form: State of California, county, or city and county, of —. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and admitted in the Superior Court of the county, or city and

§§ 1361-5 EXECUTORS AND ADMINISTRATORS.

county, of —, C. D., who is named therein as such, is hereby appointed executor. Witness, G. H., clerk of the Superior Court of the county, or city and county, of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court. G. H., clerk. [In effect April 16th, 1880.]

Seal—required, sec. 83, subd. 2: of courts, generally, sec. 147—

§ 1361. Letters of administration, with the will annexed, must be substantially in the following form: State of California, county, or city and county, of —. Last will of A. B., deceased, a copy of which is hereunto annexed, having been proved and recorded in the Superior Court of the county, or city and county, of —, there being no executor named in the will (or as the same may be), C. D. is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the Superior Court of the county, or city and county, of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court. G. H., clerk. [In effect April 16th, 1880.]

See—sec. 1360n.

§ 1362. Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of California, county, or city and county, of —. C. D. is hereby appointed administrator of the estate of A. B., deceased. (Seal.) Witness, G. H., clerk of the Superior Court of the county, or city and county, of —, with the seal thereof affixed, the — day of —, A. D. 18—. By order of the court. G. H., clerk. [In effect April 16th, 1880.]

See—sec. 1360n.

ARTICLE III.

LETTERS OF ADMINISTRATION, TO WHOM AND THE ORDERS WHICH THEY ARE GRANTED.

- § 1365. Order of persons entitled to administer. Partner not to administer.
- 1366. Preference of persons equally entitled.
- 1367. In discretion of court to appoint administrator, when.
- 1368. When minor entitled, who appointed administrator.
- 1369. Who are incompetent to act as administrators.
- § 1370. Married woman not to be administratrix.

§ 1365. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some por-

of; and they are, respectively, entitled thereto in the following order:

The surviving husband or wife, or some competent person whom he or she may request to have appointed;

The children;

The father or mother;

The brothers;

The sisters;

The grandchildren;

The next of kin entitled to share in the distribution of the estate;

The public administrator;

The creditors;

Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate. [Approved by the Legislature, 1st, 1878.]

Section not applicable—to administrator with will annexed, 52 Cal.

Persons entitled to administer—subd. 1. *Surviving husband or wife:*

community property, Civil Code, sec. 1401; 17 Cal. 525: nominee

resident widow preferred to public administrator, My. P. Rep.

Estate of Cotter, Feb. 27th, 1880, 5 Pac. C. L. J. 75: letters granted

husband do not establish his marital relations, My. P. Rep. 204.

Children, legitimate only, 52 Cal. 84: adopted son, nominee of

decedent to public administrator, My. P. Rep. 186. Subd. 4, Brother's

share, 16 Cal. 161; see sec. 1379. Subd. 7, *Next of kin*, entitled to share,

Cal. 64: grandmother's nominee preferred to creditor, My. P.

Rep. 186: nephew, 28 Cal. 182. Subd. 8, *Public administrator*, before

decedent, 46 Cal. 573: when preferred to nominee of distributee, 53

Cal. 573: discretion, where opposed by nominee of non-resident execu-

tor, My. P. Rep. 185, 238: not preferred to nominee of adopted son, My.

Rep. 186: generally, sec. 1726 *et seq.* Subd. 10, *Any other persons, etc.*,

competent, secs. 1369, 1370: nominee of brother, competent, 16 Cal.

Surviving partner—not to administer, though brother also, 16 Cal. 367.

Trusts—bank deposits—\$300 collected without administration,

1873-74, p. 132.

366. Of several persons claiming and equally entitled to

administer, males must be preferred to females,

and relatives of the whole to those of the half blood.

367. When there are several persons equally entitled to the

administration, the court may grant letters to more than one

of them; and when a creditor is claiming against the estate,

the court may, in its discretion, at the request of such creditor,

grant letters to any other person legally competent.

Appointing one or more administrators—single administrator, 29

Cal. 491; joint administrators, 24 Cal. 491.

Administrators disputing—discretion of court, 46 Cal. 573.

CODE CIV. PROC.—39.

§§ 1368-71 EXECUTORS AND ADMINISTRATORS.

§ 1368. If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, at the discretion of the court.

Guardian of minor—secs. 372, 373, and notes; secs. 1747, 1759.
Persons entitled to administer—sec. 1365, and note.

§ 1369. No person is competent or entitled to serve as administrator or administratrix who is:

1. Under the age of majority;
2. Not a *bona fide* resident of the State;
3. Convicted of an infamous crime;
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. [Approved April 1st, 1878.]

Persons incompetent to administer—*No discretion*, to exclude Cal. 476. Subd. 1, *Minor*, sec. 1368. Subd. 2, *Non-resident*, nominee when preferred, My. P. Rep. 179. Subd. 4, *Want of understanding*, Cal. 476.

§ 1370. A married woman must not be appointed as administratrix. When an unmarried woman appoints an administratrix marries, her authority is extinguished.

[Amendment approved February 13th, 1872. — § 1370. When any unmarried woman who shall have been appointed administratrix, shall marry, her marriage shall extinguish her authority as such administratrix. Administration shall not be granted to a married woman.]

Married woman as executrix—sec. 1352.

ARTICLE IV.

PETITION FOR LETTERS, AND ACTION THEREON.

- § 1371. Applications, how made.
- § 1372. When granted.
- § 1373. Notice of application.
- § 1374. Contesting applications.
- § 1375. Hearing of application.
- § 1376. Evidence of notice.
- § 1377. Grant to any applicant.
- § 1378. What proofs must be made before granting letters of administration.
- § 1379. Letters may be granted to others than those entitled.

§ 1371. Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and what is known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value of the estate.

EXECUTORS AND ADMINISTRATORS. §§ 1372-5

character of the property. If the jurisdictional facts are not fully set forth in the petition, and afterward proved in the course of administration, decree or order of administration and subsequent findings are not void on account of such want of jurisdictional averments.

Want of the jurisdictional facts—as to right to administer, 28 Cal. Evidence of decedent, 7 Cal. 215; 17 Cal. 233; 19 Cal. 188.

Want of the property—held not jurisdictional fact, 28 Cal. 182.

Want of jurisdiction of the case—where not sufficient basis for, My. P. Rep.

Findings not void—for want of jurisdictional averments, 33 Cal.

1372. Letters of administration may be granted by the court at any time appointed for the hearing of the petition, or at any time to which the hearing is concluded or postponed. [In effect April 16th, 1880.]

1373. When a petition praying for letters of administration is filed, the clerk must give notice thereof by giving notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing. [In effect April 16th, 1880.]

Want of notices—compare, sec. 1303.

1374. Any person interested may contest the petition by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration, and pray that letters be granted to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together.

Want of competency of the applicant—sec. 1369.

Want of his own rights—persons entitled to administer, sec. 1365.

1375. On the hearing, it being first proved that the petition has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

Want of notice—compare, sec. 1306: conclusive evidence, sec. 1376.

Want of the proofs, etc.—see sec. 1378: testimony admissible, 7 Cal. 215.

Want of the issuance of letters—otherwise, no authority, 34 Cal. 464.

§§ 1376-9 EXECUTORS AND ADMINISTRATORS.

§ 1376. An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice.

Entry in the minutes—when insufficient, 7 Cal. 234.

§ 1377. Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.

Other persons having better rights—may procure revocation, secs. 1333-1336.

Failure to appear, etc.—is waiver of right, 16 Cal. 161.

§ 1378. Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others, and the court may also examine any other person concerning the time, place, and manner of his death, the place of residence at the time, the value and character of the property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

Place of residence—of alleged intestate, testimony admissible, Cal. 215.

Witness—compelling attendance of, sec. 1965 *et seq.*: creditor's bill, My. P. Rep. 202.

§ 1379. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the State, affidavits, taken *ex parte* before any officer authorized by the laws of this State to take acknowledgments and administer oaths out of this State, may be received as *prima facie* evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court. [In effect April 16th, 1880.]

Section applicable—only where vacancy, 25 Cal. 585.

Discretion of the court—where will, My. P. Rep. 181.

Request of person entitled—party appointed at, My. P. Rep. 85, 16 Cal. 161; 28 Cal. 186: but when public administrator preferred, 53 Cal. 243.

Proof of identity—Affidavits, secs. 2009-2015: depositions out of State, secs. 2024-2028: *prima facie* evidence, sec. 1833.

ARTICLE V.

REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

Revocation of letters of administration.

When petition filed, citation to issue.

Hearing of petition for revocation.

Prior rights of relatives entitles them to revoke prior letters.

383. When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to a new administration, by presenting to the court a petition for the revocation, and that letters of administration be issued to him. [In effect April 16th, 1880.]

Competent—23 Cal. 476; persons incompetent, secs. 1369, 1370.

Written request—compare REQUEST OF PERSON ENTITLED TO ADMINISTRATION: before amdt. 1880, nominees not appointed, 25 Cal. 535.

Revocation of the letters—granting fresh letters, effects, 40 Cal. 505; citation on court, 23 Cal. 476.

384. When such petition is filed, the clerk must, in accordance with the notice provided in section thirteen hundred and seventy-three, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing. [In effect July 1st, 1874.]

Citation—to administrator, 23 Cal. 479: generally, secs. 1707-1711.

385. At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, the letters of administration must be granted to him, and the letters of the former administrator revoked.

Hearing and appointment—23 Cal. 480.

386. The surviving husband or wife, when letters of administration have been granted to a child, father, mother, or sister of the intestate; or any of such relatives, when letters have been granted to any other person, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

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§§ 1387-8 EXECUTORS AND ADMINISTRATORS.

ARTICLE VI.

OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS, ETC.

- § 1387. Administrator or executor to take oath. Letters and bonds to be recorded.
- § 1388. Bond of administrators, form and requirements of.
- § 1389. Additional bonds, when required.
- § 1390. Condition of bonds.
- § 1391. Each, or more than one administrator, to give separate bonds.
- § 1392. Several recoveries may be had on same bond.
- § 1393. Bonds, and justification of sureties on. Must be approved by court.
- § 1394. Citation and requirements of judge on deficient bond. Additional security.
- § 1395. Right ceases, when.
- § 1396. When bond may be dispensed with.
- § 1397. Petition showing falling sureties and asking for further bonds.
- § 1398. Citation to executor, etc., to show cause against such application.
- § 1399. Further security may be ordered.
- § 1400. Neglecting to obey order.
- § 1401. Suspending powers of executor, etc.
- § 1402. Further security ordered without application of party interested.
- § 1403. Release of sureties.
- § 1404. New sureties.
- § 1405. Neglect to give new sureties forfeits letters.
- § 1406. Application to be determined out of term time.
- § 1407. Liability on bond.

§ 1387. Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, and books to be kept by him in his office for that purpose.

§ 1388. Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the State of California with two or more sufficient sureties, to be approved by the Superior Court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of real property belonging to the estate, which values must be ascertained by the Superior Court, or a judge thereof, by examining on oath the party applying, and any other persons. [In effect April 16th, 1880.]

State of California—executed to, compare, 6 Cal. 632.

EXECUTORS AND ADMINISTRATORS. §§ 1389-93

ies—secs. 1393, 1394, 1397-1400, 1403, 1404, 1407.

oved by judge—at chambers, sec. 166.

—condition of, sec. 1390: separate, when, sec. 1391: recovery on, sec. 1402, 1407: not required, when, sec. 1396: further security, secs. 1394-1402: stands as undertaking on appeal, sec. 970: undertakings generally, sec. 941a.

Amount of bond—when no review of action fixing, 28 Cal. 182.

to be the value of the personal property—My. P. Rep. 239.

1389. The Superior Court, or a judge thereof, must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given on receiving letters, or of any bond given in place of the same, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate to be sold. [In effect April 16th, 1880.]

Additional bond—objection to confirmation of sale, because sureties insufficient, 50 Cal. 308: may also be required of public administrator, sec. 1397.

1390. The bond must be conditioned that the executor or administrator shall faithfully execute the duties of his office according to law.

Conditions of the bond—no breach of, 5 Cal. 443.

Conditions of the trust—see sec. 1581 *et seq.*

1391. When two or more persons are appointed executors or administrators, the Superior Court, or a judge thereof, must require and take a separate bond from each person. [In effect April 16th, 1880.]

1392. The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.

Recovery upon—joining defendants, sec. 333.

Recovery in own name—party beneficially interested, sec. 367 and notes.

Surety—secs. 1388, 1399.

Use of money—payable under bond, sec. 1407.

1393. In all cases where bonds or undertakings are required to be given, under this title, the sureties must be taken thereon in the same manner and in like amounts as required by section ten hundred and fifty-seven of this title, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All

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§§ 1394-7 EXECUTORS AND ADMINISTRATORS.

such bonds and undertakings must be approved by judge of the Superior Court before being filed or recorded [In effect April 16th, 1880.]

Approved by judge—at chambers, sec. 166.

Examination of sureties—when qualifications questioned, sec. 167.

§ 1394. Before the judge approves any bond required under this title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause notice to be issued to the executor or administrator requiring his appearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security. [In effect April 16th, 1880.]

Citations—secs. 1707-1711.

Additional security—effect of failure to give, in time, sec. 1395.

§ 1395. If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

§ 1396. When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed without any bond, unless the court, for good cause, require one to be executed; but the executor may at any time afterward, if it appear from any cause necessary or proper, be required to file a bond, as in other cases. [In effect July 1st, 1874.]

Bond subsequently required—sec. 1401 not in conflict with this section, see 53 Cal. 19.

§ 1397. Any person interested in an estate may, by verified petition, represent to the Superior Court, or judge thereof, that the sureties of the executor or administrator thereof have become, or are becoming, insolvent or that they have removed, or are about to remove, from the State, or that from any other cause the bond is in

ent, and ask that further security be required. [In April 16th, 1880.]

Further security—court may, sec. 1402.

1398. If the court, or a judge thereof, is satisfied the matter requires investigation, a citation must be to the executor or administrator, requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or cannot be found, it may be served by leaving a copy of it at his place of residence, or by publication as the court or a judge thereof may order. [In effect April 16th, 1880.]

1399. On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new one in the usual form, within a reasonable time, not exceeding five days.

1400. If the executor or administrator neglects to comply with the order within the time prescribed, the court must, by order, revoke his letters, and his authority terminates thereupon.

1401. When a petition is presented, praying that an executor or administrator be required to give further security, or to give bond, where by the terms of the will no security was originally required, and it is alleged on oath that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

Duration of executor—until bond given, not in conflict with sec. Cal. 19.

1402. When it comes to his knowledge that the bond of an executor or administrator is from any cause insufficient, the judge, without any application, must cause the executor to be cited to appear and show cause why he should not give further security, and must proceed thereon as if on the application of any person interested. [In effect April 16th, 1880.]

1403. When a surety of any executor or administrator desires to be released from responsibility on ac-

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§§ 1404-11 EXECUTORS AND ADMINISTRATORS.

count of future acts, he may make application to Superior Court, or a judge thereof, for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring to appear at a time and place to be therein specified, to give other security. If he has absconded, left, removed from the State, or if he cannot be found, and due diligence and inquiry, service may be made as provided in section one thousand three hundred and ninety-eight. [In effect April 16th, 1880.]

Sureties released, when—by change in trust estate, 53 Cal. 451.

§ 1404. If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on the bond for any subsequent act, default, or misconduct of the executor or administrator.

§ 1405. If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters.

§ 1406. The applications authorized by the nine preceding sections of this chapter may be heard and determined at any time. All orders made therein must be entered upon the minutes of the court. [In effect April 16th, 1880.]

§ 1407. The liability of principal and sureties upon the bond of any executor, administrator, or guardian in all cases to pay in the kind of money or currency which the principal is legally liable. [In effect July 1st, 1874.]

ARTICLE VII.

SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES.

- § 1411. Special administrator, when appointed.
- 1412. Special letters may be issued out of term time.
- 1413. Preference given to persons entitled to letters.
- 1414. Special administrator to give bond and take oath.
- 1415. Duties of special administrator.
- 1416. When letters testamentary or of administration are granted special administrator's powers cease.
- § 1417. Special administrator to render account.

§ 1411. When there is delay in granting letters testamentary or of administration from any cause, or when

EXECUTORS AND ADMINISTRATORS. §§ 1412-15

Letters are granted irregularly, or no sufficient bond is required, or when no application is made for letters, or when an executor or administrator dies, is suspended, or removed, the Superior Court, or a judge thereof, must appoint a special administrator to take charge of the estate of the decedent in any county or counties the same may be found, and exercise such other powers as may be necessary for the administration of the estate; or he may direct the public administrator of his county to take charge of the estate. [In effect April 16th, 1880.]

12. The appointment may be made at any time, without notice, and must be made by entry upon the records of the court, specifying the powers to be exercised by the administrator. Upon such order being entered and after the person appointed has given bond, the court must issue letters of administration to such person in conformity with the order. [In effect April 16th, 1880.]
and bond—see sec. 1414.

13. In making the appointment of a special administrator, the court or judge must give preference to persons entitled to letters testamentary or of administration; and no appeal must be allowed from the appointment. [In effect April 16th, 1880.]

entitled to letters—sec. 1365 *et seq.*

14. Before any letters issue to any special administrator, he must give bond in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters. [In effect April 16th, 1880.]

and bond of administrator, etc.—see secs. 1387-1407.

15. The special administrator must collect and preserve for the executor or administrator, all the goods, effects, debts, and effects of the decedent; all incomes, rents, issues, and profits, claims, and demands of the estate; and must take the charge and management of, enter into, and preserve from damage, waste, and injury, the real estate; and for any such and all necessary purposes commence and maintain or defend suits and other proceedings as an administrator: he may sell such real and personal property as the court may order to be sold, and exercise such other powers as are conferred upon him by the court at the time of his appointment, but in no case is he liable to an action

STAMPCON 1/11/1880

§§ 1416-24 EXECUTORS AND ADMINISTRATORS.

by any creditor on a claim against the decedent. [I
fect April 16th, 1880.]

Special administrator—powers as to suits, 50 Cal. 299: alleged
version by, 50 Cal. 616.

§ 1416. When letters testamentary or of admin
tion on the estate of the decedent have been granted
powers of the special administrator cease, and he
forthwith deliver to the executor or administrator al
property and effects of the decedent in his hands,
the executor or administrator may prosecute to final
ment any suit commenced by the special administrat

§ 1417. The special administrator must render a
count, on oath, of his proceedings, in a like mann
other administrators are required to do.

Account of administrator, etc.—sec. 1622 *et seq.*

ARTICLE VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANT AND MISCELLANEOUS PROVISIONS.

§ 1423. On proof of will, after grant of letters of administratio
ters revoked.

§ 1424. Power of executor in such a case.

§ 1425. Remaining administrator or executor to continue wh
colleagues are disqualified.

§ 1426. Who to act when all acting are incompetent.

§ 1427. Executor or administrator may resign, when. Court to ap
successor. Liability of outgoer.

§ 1428. All acts of executor, etc., valid until his power is revoked

§ 1429. Transcript of court minutes to be evidence.

§ 1423. If, after granting letters of administratio
the ground of intestacy, a will of the decedent is
proved and allowed by the court, the letters of adm
tration must be revoked, and the power of the adm
trator ceases, and he must render an account of his
ministration within such time as the court shall direc

Letters must be revoked—but formal removal unnecessary, 4
497.

Account of administration—sec. 622 *et seq.*

§ 1424. In such case, the executor or the administ
with the will annexed is entitled to demand, sue fo
cover and collect all the rights, goods, chattels, debts
effects, of the decedent remaining unadministered,
may prosecute to final judgment any suit commence
the administrator before the revocation of his lette
administration.

Inventory and collection of decedent's effects—secs. 1443-1445

EXECUTORS AND ADMINISTRATORS. §§ 1425-7

25. In case any one of several executors or administrators to whom letters are granted, dies, becomes lunatic, convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the testamentary or of administration are revoked or annulled, with respect to any one executor or administrator remaining executor or administrator must proceed to complete the execution of the will or administration.

26. If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the same penalty, with like sureties and conditions, as is before required of administrators, and shall have the same power and authority. [In effect April 16th, 1880.]
Letters of administration—order and manner of granting, sec. 1365
with will annexed, sec. 1356; 32 Cal. 436.
Bond and bond—secs. 1387-1407.

Power and authority—sec. 1581 *et seq.*

27. Any executor or administrator may, at any time, by writing, filed in the Superior Court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the case, or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the appointment of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation. [In effect April 16th, 1880.]

Resignation—assumpsions—as to resignation, etc., on collateral attack on proceedings, 28 Cal. 182.

Resignation not at will—of administrator, 10 Cal. 116; 20 Cal. 288.

Compensation—where administrator resigns, 3 Cal. 287; 5 Cal. 437.

Settling his accounts—acceptance improper before, 10 Cal. 110.

Delivering up estate—to person appointed, 5 Cal. 437.

CODE CIV. PROC.—40.

§§ 1428-31 EXECUTORS AND ADMINISTRATORS.

§ 1428. All acts of an executor or administrator such, before the revocation of his letters testamentary or of administration, are as valid to all intents and purposes as if such executor or administrator had continued fully to execute the duties of his trust.

Executor de son tort—at common law, 17 Cal. 182: now probably obsolete, 50 Cal. 388.

§ 1429. A transcript from the minutes of the court showing the appointment of any person as executor or administrator, together with the certificate of the clerk under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect as evidence as the letters themselves.

Letters and bond recorded—sec. 1387.

ARTICLE IX.

DISQUALIFICATION OF JUDGES AND TRANSFERS OF ADMINISTRATIONS.

§ 1430. When judge not to act.

§ 1431. Judge being disqualified, proceedings to be transferred, where.

§ 1432. Transfer not to change right to administer. Retransfer, made.

§ 1433. When proceedings to be returned to original court.

§ 1430. No will shall be admitted to probate, or letters testamentary or of administration granted, before a judge who is interested as next of kin to the decedent as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto or is in any other manner interested or disqualified from acting. [In effect April 16th, 1880.]

Judge interested in estate—disqualified, where agent for heirs. Cal. 190: where interested in a sale of the realty, *Tracy v. Colby*, 11th, 1880, 5 Pac. C. L. J. 534.

§ 1431. When a petition is filed in the Superior Court praying for admission to probate of a will, or for grant of letters testamentary or of administration, or when proceedings are pending in the Superior Court for the settlement of an estate, and there is no judge of said court qualified to act, an order must be made transferring the proceeding to the Superior Court of an adjoining county and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceeding is ordered to be transferred, a certified copy of the or

EXECUTORS AND ADMINISTRATORS. §§ 1432-3

all the papers on file in his office in the proceeding; thereafter the court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the case. [In effect April 16th, 1880.]

Change of venue—to obtain impartial trial, 15 Cal. 220; 37 Cal. 190; 245: generally, secs. 397-398.

1432. The transfer of a proceeding from one court to another, as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the persons are entitled to letters testamentary or of administration on the estate, in the order hereinafter provided. If, before the administration is closed of any estate so transferred as herein provided, another person is named or appointed, and qualified as judge of the court in which such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting out these facts, and moving the court therefor. [In effect April 16th, 1880.]

1433. On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the court where it was originally commenced; and the clerk of the court originating the transfer must transmit to the clerk of the court to which the proceeding was originally commenced, a certified copy of the order, and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter exercise jurisdiction and power to make all necessary orders and decrees to close up the administration or the estate. [In effect April 16th, 1880.]

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§§ 1436-9 EXECUTORS AND ADMINISTRATORS.

ARTICLE X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

§ 1436. Suspension of powers of executor.

§ 1437. Executor to have notice of his suspension, and to be cited to appear.

§ 1438. Any party interested may appear on hearing.

§ 1439. Notice to absconding executors and administrators.

§ 1440. May compel attendance.

§ 1436. Whenever a judge of a Superior Court reason to believe, from his own knowledge, or from credible information, that any executor or administrator wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or has recently removed from the State, or has wrongfully neglected the estate, or has long neglected to perform his duty as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator, until the matter is investigated. [In effect April 16th, 1880.]

Misconduct of executor—as to inventory, sec. 1450: as to executor's account, secs. 1628, 1630.

Suspension of executor, etc.—done at chambers, sec. 166: definition, 6 Cal. 666.

§ 1437. When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require.

§ 1438. At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issue raised must be heard and determined by the court.

As hereinbefore provided—demurring or answering, compare sec. 1312.

Determined by the court—My. P. Rep. 68.

§ 1439. If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the State, notice may be given him of the pendency of the proceedings by publication, in such manner as

may direct, and the court may proceed upon such as if the citation had been personally served.

are—sec. 1630.

40. In the proceedings authorized by the preceding s of this article, for the removal of an executor or strator, the court may compel his attendance by at- ent, and may compel him to answer questions, on ouching his administration, and, upon his refusal o, may commit him until he obey, or may revoke ers, or both.

elling obedience—compare, secs. 1627, 1628: as to contempt, 1209, 1219.

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CHAPTER IV.
OF THE INVENTORY AND COLLECTION
THE EFFECTS OF DECEDENTS.

ART. I. INVENTORY, APPRAISEMENT, AND POSSESSION OF REAL ESTATE.

II. EMBEZZLEMENT AND SURRENDER OF REAL ESTATE.

ARTICLE I.

INVENTORY, APPRAISEMENT, AND POSSESSION OF REAL ESTATE.

1443. Inventory to be returned, including the homestead.
 1444. Appraisement and pay of appraisers.
 1445. Oath of appraisers and inventory, how made.
 1446. Inventory to account for moneys. If all money, no appraisement necessary.
 1447. Effect of naming a debtor executor.
 1448. Discharge or bequest of debt against executor.
 1449. To make oath to inventory.
 1450. Letters may be revoked for neglect of administrator.
 1451. Inventory of after-discovered property.
 1452. Administrator and executor to possess real and personal property.
 1453. Executor or administrator to deliver real estate to devisees at the end of ten months, unless there are dēvisees to be satisfied.

§ 1443. Every executor or administrator must return and return to the court, within three months after his appointment, a true inventory and appraisement of a decedent's estate of the decedent, including the homestead, if any, which has come to his possession or knowledge. [In 1880, April 16th, 1880.]

Within three months—amdt. 1880: previously at first term of court; appointment: but as to abolition of terms, see sec. 73n.

Inventory—when unnecessary, 1 Cal. 488: receivable at chancery, sec. 166: estoppel as to, My. P. Rep. 203: is not basis of comm. 43 Cal. 543.

§ 1444. To make the appraisement, the court, judge thereof, must appoint three disinterested persons (any two of whom may act) who are entitled to receive reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which

issued, appraisers thereof may be appointed, either court or judge having jurisdiction of the estate, or court or judge of such other county, on request of court or judge having jurisdiction. [In effect April 1880.]

Appraisers—duty as to homestead, secs. 1476, 1486: appointed at law, sec. 166.

145. Before proceeding to the execution of their duty the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be sworn to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with its value thereof in dollars and cents, in figures, opposite the articles, respectively; the inventory must contain a statement of the estate of the decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of which money is due, belonging to the decedent, specifying the name of the creditor in each security, the date, the sum originally due, the indorsements thereon, (if any) with their value, and the sum which, in the judgment of the appraiser, may be collected on each debt, interest, or security. The inventory must show, so far as the same can be ascertained by the executor or the administrator, what portion of the property is community property, and what portion is the separate property of the decedent.

146. The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator; and if none, it must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisal, but an inventory must be made and returned as in other cases.

147. The naming of a person as executor does not discharge him from any just claim which the decedent has against him, but the claim must be included in the inventory, and the executor is liable for the same, for so much money in his hands, when the debt or demand becomes due.

148. The discharge or bequest in a will, of any debt or demand of the testator against the executor named, or against any other person, is not valid against the creditors of

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the decedent, but is a specific bequest of the debt or mand. It must be included in the inventory, and if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

Demand—or claim, meaning of, 52 Cal. 568.

§ 1449. The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

§ 1450. If an executor or administrator neglects or refuses to return the inventory within the time prescribed or within such further time, not exceeding two months which the court or judge shall for reasonable cause allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate or any person interested therein, arising from such failure.

§ 1451. Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

Enforced by attachment, etc.—compare sec. 1440.

§ 1452. The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court to the heirs or devisees; and he must keep in good tenantable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do. [In effect April 16th, 1880.]

priority of executors—sec. 1355*n*.

Passion of estate—see sec. 1581; 15 Cal. 259: **personalty, right to**, 5; 20 Cal. 620; 28 Cal. 182; 29 Cal. 507; by coexecutor, 33 Cal. 658: **that of heirs, etc.**, sec. 1581: by husband of devisee and executor, Cal. 462: as to partnership property, see sec. 1585: **administration of, against heirs**, 20 Cal. 620; 47 Cal. 168; 53 Cal. 655; Page *v.* Feb. 4th, 1880, 4 Pac. C. L. J. 538.

delivered to heirs—see sec. 1453.

done by executor, etc.—secs. 1453, 1581, 1582 *et seq.*; 14 Cal. 117; 29 Cal. 31.

done for devisees—action by, not compulsory, amdt. 1880: when executor may maintain ejectment, 18 Cal. 453; 20 Cal. 620; 51 Cal. 146. **done against heir—erroneous in suit as to personalty**, 23 Cal. 16.

1453. Unless it satisfactorily appear to the court that the debts, issues, and profits of the real estate for a longer period than ten months are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court, at the end of the time allowed for the presentation of claims against the estate, shall direct the executor or administrator to deliver possession of all the real estate to the heirs-at-law or devisees. [In effect April 16th, 1880.]

Time of possession—before amdt. 1880, at end of ten months after first publication of notice to creditors.

Administratrix not to dispose of property, etc.—50 Cal. 471.

ARTICLE II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

Embezzling estate before grant of letters testamentary.

Citation to person suspected to have embezzled estate, etc.

Refusal to obey citation, penalty for, and for embezzlement. May be compelled to disclose by imprisonment. Liable for double damages.

Persons intrusted with the estate of decedent may be cited to account.

1458. If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith and liable to an action by the executor or administrator of the estate, for the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

Done by executors, etc.—for conversion, 14 Cal. 250; 29 Cal. 507: *amdt.*, secs. 1452, 1460, 1581 *et seq.*

1459. If any executor, administrator, or other person interested in the estate of a decedent, complains to

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the Superior Court, or a judge thereof, on oath, that person is suspected to have concealed, embezzled, stolen, sold, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent in any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the Superior Court of the county where he is found, or before the Superior Court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate. [In effect April 16th, 1880.]

Section inapplicable—to transactions after death of decedent. P. Rep. 59.

§ 1460. If the person so cited refuses to appear, or to submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of such complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, stolen, sold, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent in any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and the answers to such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be *prima facie* evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the

assessed by the court or jury, or for return of the
y and damages in addition thereto, equal to the
f such property. In addition to the examination
party, witnesses may be produced and examined
r side. [In effect April 16th, 1880.]

pt—secs. 1209, 1219.

1. The Superior Court, or a judge thereof, upon
plaint, on oath, of any executor or administrator,
e any person who has been intrusted with any
the estate of the decedent to appear before such
nd require him to render a full account, on oath,
moneys, goods, chattels, bonds, accounts, or other
y or papers belonging to the estate, which have
his possession in trust for the executor or ad-
ator, and of his proceedings thereon; and if the
so cited refuses to appear and render such ac-
he court may proceed against him as provided in
eding section. [In effect April 16th, 1880.]

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CHAPTER V.
**OF THE PROVISION FOR THE SUPPORT
 OF THE FAMILY, AND OF THE
 HOMESTEAD.**

ART. I. OF THE PROVISION FOR THE SUPPORT OF THE
 FAMILY.
 II. OF THE HOMESTEAD.

ARTICLE I.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

- § 1464. Widow and minor children may remain in decedent's house.
- § 1465. All property exempt from execution to be set apart for family.
- § 1466. May make extra allowance.
- § 1467. Payment of allowance.
- § 1468. Property set apart, how apportioned between widow and children.
- § 1469. Estate less than fifteen hundred dollars to go to wife and those less than three thousand to be summarily administered.
- § 1470. When all property to go to children.

§ 1464. When a person dies, leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the Superior Court on a judge thereof. [In effect April 16th, 1880.]

Occupying homestead—until letters granted, 15 Cal. 47: remainder after return of inventory, My. P. Rep. 55.

Household furniture—mortgaged, allotted to widow, My. P. Rep. 227.

Other personal property—widow has not control of, 29 Cal. 513. Provisions for support—of family, secs. 1466, 1467.

§ 1465. Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded; provided

homestead was selected from the common property, or from the separate property, of the persons selecting in the selection of the same. If none has been designated, and recorded, or in case the homestead selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the survivor must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the children, in the manner provided in article two of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent. [In effect April 16th, 1880.]

Homestead—nature of estate, 36 Cal. 11; extent of 33 Cal. 220; 37 Cal. 47; 47 Cal. 627; residence required, 52 Cal. 629, 630; when right not lost, 53 Cal. 715.

Set apart homestead—"may" interpreted "shall," My. P. Rep. 1880; duty of judge, 35 Cal. 310, 320; 45 Cal. 696; in the manner provided by repealed sections, 47 Cal. 79; 50 Cal. 539; withdrawal of estate, 29 Cal. 101; 35 Cal. 310; My. P. Rep. 70, 155; Estate of Burns, 1880, 5 Pac. C. L. J. 49; subject to incumbrances, 50 Cal. 544; right not waived, 50 Cal. 335; order of sale does not prevent, 51 Cal. 1; where widow marries again, 43 Cal. 642; 46 Cal. 265; where no common property, 39 Cal. 665; order must be recorded, sec. 1486; partition, 23 Cal. 417; but see SUPERSEDED COURTS, sec. 762; as substitute, not permitted, 30 Cal. 105.

Separate property of person selecting, etc.—amdt. 1880: compare 47 Cal. 4, and 50 Cal. 541.

§ 1466. If the amount set apart be insufficient for the support of the widow and children, or either, the court judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration. [In effect April 16th, 1880.]

Family allowance—marital basis for, My. P. Rep. 1; maintenance according to circumstances, 39 Cal. 80.

§ 1467. Any allowance made by the court or judge, in accordance with the provisions of this article, must be given in preference to all other charges, except funeral expenses and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

§ 1468. When property is set apart to the use of the family, in accordance with the provisions of this chapter.

if the decedent left a widow or surviving husband no minor child, such property is the property of widow or surviving husband. If the decedent left a minor child or children, the one-half of such property belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children there be more than one. If there be no widow or surviving husband, the whole belongs to the minor children. If the property set apart be a homestead selected from the separate property of the deceased, the court can only set it apart for a limited period, designated in the order, and the title vests in the heirs of the deceased, subject to such order. [Approved February 19th, 1881.]

Where widow has a maintenance—sec. 1476.

§ 1469. If, upon the return of the inventory of the estate of a deceased person, it shall appear thereon that the value of the whole estate does not exceed the sum of fifteen hundred dollars, and if there be a widow or minor children of the deceased, the court or a justice thereof shall, by order, require all persons interested in the said estate to appear on a day fixed, to show cause why the whole or a part of the said estate should not be assigned for the use and support of the family of the deceased. Notice thereof shall be given and proceedings had in the same manner as provided in sections one thousand six hundred and thirty-three, one thousand six hundred and thirty-five, and one thousand six hundred and thirty-eight of this Code. Upon the hearing, the court finds that the value of the estate does not exceed the sum of fifteen hundred dollars, it shall, by a decree for that purpose, assign for the support of the widow and minor children, if there be a widow and minor children, and if no widow, then to the children, if there be any, and if no children, then to the widow, the whole of the estate after the payment of the expenses of the last illness of the deceased, funeral charges, and expenses of administration, and there shall be no further proceedings in the administration, unless a further estate be discovered. [In effect April 16th, 1880.]

§ 1470. If the widow has a maintenance derived from her own property equal to the portion set apart to her in the preceding sections of this article, the whole property so set apart, other than the homestead, must go to the widow and minor children. [In effect April 16th, 1880.]

ARTICLE II.

OF THE HOMESTEAD.

- Rights of survivor to homestead.**
- Selected and recorded homestead set off to person entitled.** Substituting liens to be paid by solvent estate.
- Appraisers to carve out of the original, exceeding five thousand dollars in value, a homestead, and report the same.**
- Report of the appraisers.** Majority and minority, which may be confirmed.
- Day to be set for confirming or rejecting the report of the appraisers.** Appeal.
- If report rejected, other appraisers appointed.** If again rejected, partition suit to be brought.
- Instead of dividing the homestead, who may take a deed thereof at appraised value.**
- If no homestead is selected and recorded prior to death of decedent, one may be petitioned for.**
- Court to direct partition suit in the District Court, when.** Proceedings thereon.
- If property is common or separate, court to cause appraisal and admeasurement to be made.**
- New appraisal, when ordered.** Instead of deeding property at appraised value, public sale to be ordered, when.
- Costs, to whom chargeable.** Persons succeeding to rights of homestead owners have all their powers and rights.
- Certified copies of certain orders to be recorded.**

1474. If the homestead selected by the husband and or either of them, during their coverture, and real while both were living, was selected from the community property, or from the separate property of the wife, or from the separate property of the husband, in selecting or joining in the selection of the same, on the death of the husband or wife, absolutely to the survivor. If the homestead was selected from the community property of either the husband or the wife, with or without her consent, it vests, on the death of the person whose property it was selected, in his or her heirs, and is not to the power of the Superior Court to assign it for a limited period to the family of the decedent. In either case, the homestead is not subject to the payment of any debt or liability contracted by or existing against the husband and or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code. [In effect April 16th, 1880.]

Homestead—generally, and setting apart, sec. 1465, notes.
Separate property of person selecting, etc.—amdt. 1880.
Survivorship of homestead—out of separate property, 50 Cal. 530; 51 Cal. 530; 52 Cal. 294; before such changes, 49 Cal. 198; and see 68; 8 Cal. 507; 14 Cal. 472; 23 Cal. 415; 25 Cal. 114; 31 Cal. 526; 35 Cal. 176; 36 Cal. 16; 37 Cal. 176.

1475. If the homestead selected and recorded prior to the death of the decedent be returned in the inventory of the estate valued at not exceeding five thousand dollars in value.

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or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the Superior Court must, by order, set it off to the persons whom title is vested by the preceding section. If there be subsisting liens or incumbrances on the homestead, claims secured thereby must be presented and allowed against other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead in any deficiency remaining after such payment. [In effect April 16th, 1880.]

Homestead selected during decedent's lifetime—effect of setting apart, 41 Cal. 34.

Liens or incumbrances—on homestead, former effect of setting apart mortgaged premises, 45 Cal. 436.

§ 1476. If the homestead, as selected and recorded, returned in the inventory appraised at more than five thousand dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they cannot be thus divided, they must admeasure and set apart for the parties entitled thereto, such portion of the premises including the dwelling-house, as will amount in value to the sum of five thousand dollars, and make report thereon giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five thousand dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto. [In effect July 1st, 1874.]

Appraisement—generally, sec. 1444.

§ 1477. Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third

appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

§ 1478. When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time, and in such manner as the court may direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report. [In effect July 1st, 1874.]

§§ 1479, 1480, 1481, 1482, 1483, 1484 are repealed. [In effect July 1st, 1874.]

§ 1485. The costs of all proceedings in the Superior Court provided for in this chapter, must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire. [In effect April 16th, 1880.]

Cost of proceedings—payable out of estate, My. P. Rep. 158.

§ 1486. A certified copy of every final order made in pursuance of this article, by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated.

Certified copy—recording, see sec. 1719.

CHAPTER VI. OF CLAIMS AGAINST THE ESTATE.

1490. Notice to creditors. Additional notice.
 1491. Time expressed in the notice.
 1492. Copy and proof of notice to be filed and order made.
 1493. Time within which claims against an estate must be presented.
 1494. Claims to be sworn to, and when allowed, to bear same interest as judgments.
 1495. Probate judge may present claim, and action thereon.
 1496. Allowance and rejection of claims.
 1497. Approved claims or copies to be filed. Claims secured by lien may be described. Lost claims.
 1498. Rejected claims to be sued for within three months.
 1499. Claims barred by Statute of Limitations. When and who probate judge may examine.
 1500. Claims must be presented before suit.
 1501. Time of limitation.
 1502. Claims in action pending at time of decease.
 1503. Allowance of claim in part.
 1504. Effect of judgment against executor.
 1505. Execution not to issue after death. If one is levied the property may be sold.
 1506. What judgment is not a lien on real property of estate.
 1507. May refer doubtful claims. Effect of referee's allowance and rejection.
 1508. Trial by referee, how confirmed and its effect.
 1509. Liability of executor, etc., for costs.
 1510. Claims of executor, etc., against estate.
 1511. Executor neglecting to give notice to creditors, to be removed.
 1512. Executor to return statement of claims.

§ 1490. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them with the necessary vouchers, to the executor or administrator; at the place of his residence or business, to be specified in the notice; such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation.

Publication of notice—how often, § 1705.

Claims to be exhibited—scope of word "claims," 9 Cal. 636; 21 Cal. 666; 27 Cal. 350.

Two months' neglect—to give notice, causes revocation of letters, sec. 1511.

§ 1491. The time expressed in the notice must be ten months after its first publication when the estate exceeds a value the sum of ten thousand dollars, and four months when it does not.

Figures of appraisement govern—My. P. Rep. 203.

§ 1492. After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court.

Affidavit of publication—of notice, secs. 2010, 2011.

§ 1493. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; *provided, however*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the State, it may be presented at any time before a decree of distribution is entered. [In effect April 16th, 1880.]

Claim—action, none unless claim presented, sec. 1500; after rejection, sec. 1498; pending at death, claim must be presented, sec. 1502; affidavit, sec. 1494; allowance or rejection of, secs. 1496-1498, 1503; My. P. Rep. 163; amendment, 29 Cal. 362; contingent, secs. 1648; 18 Cal. 422; 4 Cal. 263; My. P. Rep. 46; 49 Cal. 111; due, when, findings should show, 3 Cal. 84; executor, by, sec. 1510; against, judgment on, secs. 1504, 1509; interest on, secs. 1494, 1513; Judge of Superior Court, sec. 1495; judgment, against decedent, where, sec. 1505; lien, see Mortgage: limitations, barred by statute of, secs. 353, 1499, 1501; meaning of word, 52 Cal. 568; mortgage, or lien on, secs. 1475, 1497, 1500; My. P. Rep. 184; not due, when not barred, 19 Cal. 85; out of State, where claimant, 22 Cal. 16; partner of surviving, contingent, 34 Cal. 263; presentation of, proper before publication of notice to creditors, 19 Cal. 330; on note, not a demand of payment, 49 Cal. 469; object of, 10 Cal. 559; examination on, by judge, sec. 1499; time limited for, barred if later, 34 Cal. 603; My. P. Rep. 159; trust fund, as to, 22 Cal. 518; 31 Cal. 17; on mortgage, or lien, sec. 1500; without, pledge may be redeemed by administrator, My. P. Rep. 87; not required of claimant of specific property, 9 Cal. 643; necessity of, 18 Cal. 422; objection to omission, when too late, 2 Cal. 130; reference of, sec. 1507; signification of word, 6 Cal. 666; 9 Cal. 636; 21 Cal. 25; 27 Cal. 350; 38 Cal. 87; 52 Cal. 568; statement of claims, sec. 1512; statutory sense, demand, when not claim in, 10 Cal. 660; taxes, when not, 43 Cal. 492; 50 Cal. 522, and see sec. 1669.

✓ § 1494. Every claim which is due, when presented to the executor or administrator, must be supported by an affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When an affidavit is made by a person other than the claimant, it must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the Superior Court. [In effect April 16th, 1880.]

Every claim—signification, see under CLAIM, sec. 1493n: on mortgage or lien, see sec. 1500 and note.

Affidavit—by person other than claimant, formerly held improper, 14 Cal. 179; need of, 18 Cal. 422.

Section—when not to be invoked, 42 Cal. 174.

Contingent claim—see 18 Cal. 422; 49 Cal. 111.

Interest—on claim, 14 Cal. 172: waiver of, My. P. Rep. 235: on judgment against administrator, 19 Cal. 98: where judgment on rejection of claim, 18 Cal. 376.

Insolvent estate—rate of interest restricted, My. P. Rep. 55.

§ 1495. Any judge of a Superior Court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must by writing designate some other judge of the Superior Court of the same or an adjoining county, who, upon the presentation of such claim to him, is vested with power to allow or reject it, and the judge presenting such claim, in case of its rejection by the executor or administrator, by such judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected. [In effect April 16th, 1880.]

§ 1496. When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to a judge of the Superior Court for his approval, who must in the same manner

horse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to endorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, shall be *prima facie* evidence of such presentation and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time. If the claim be payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency. [In effect April 16th, 1880.]

Allowance of claim—by executor, verbal not enough, 46 Cal. 154; by one administrator, sufficient, 24 Cal. 471; by judge, 49 Cal. 154; on mortgage, effect of, 6 Cal. 412; generally, effect of, 18 Cal. 422; 26 Cal. 421.

Rejection of claim—by executor's inaction, 34 Cal. 224; by judge, rounds, 22 Cal. 99; further proofs before, 23 Cal. 363.

§ 1497. Every claim allowed by the executor or administrator, and approved by a judge of the Superior Court, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim, or any part thereof, be secured by a mortgage, or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance. [In effect April 16th, 1880.]

§§ 1498-1501 CLAIMS AGAINST ESTATE.

Allowed claim—status of, 6 Cal. 666; 23 Cal. 363; 46 Cal. 315; 49 Cal. 152: not interest bearing, My. P. Rep. 125.

Filing claim—omission, when does not bar, 24 Cal. 491: proved merely directory, 46 Cal. 304.

Claim secured by mortgage, etc.—see sec. 1500 and note, and 27 Cal. 350.

§ 1498. When a claim is rejected either by the executor or administrator, or a judge of the Superior Court, the holder must bring suit in the proper court against the executor or administrator within three months after date of its rejection, if it be then due, or within three months after it becomes due, otherwise the claim shall forever be barred. [In effect April 16th, 1880.]

Time for bringing suit—sec. 1501; 2 Cal. 385; 19 Cal. 85; 34 Cal. 215.

§ 1499. No claim must be allowed by the executor or administrator, or by a judge of the Superior Court, which is barred by the Statute of Limitations. When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. [In effect April 16th, 1880.]

Statute of Limitations—secs. 335-363: object of, sec. 353: to protect period, 19 Cal. 85; and time of vacancy immaterial, 10 Cal. 386: vacancy in administration does not affect, sec. 1501 and note: on judgment against decedent, 19 Cal. 97: allowance of barred claim, binding, 23 Cal. 363: note for outlawed debt, when valid, 50 Cal. 215; when debt barred, 51 Cal. 215.

§ 1500. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented. [In effect March 15th, 1876.]

No action on claim—without presentation, 38 Cal. 3: claim barred but not extinguished, 50 Cal. 145.

Mortgage on lien, presentation of claim on—need of, 6 Cal. 24; Cal. 499; 27 Cal. 350; 46 Cal. 154, 222; 52 Cal. 232: effect of failure to present, etc., see last subhead, and 10 Cal. 555; 21 Cal. 67; 42 Cal. 493; 50 Cal. 145; Hib. S. & L. Soc. v. Jordan, May 19th, 1880; 5 Pac. C. L. J. objection too late, 23 Cal. 568: subsequent proceedings, sec. 1569; Cal. 24; 24 Cal. 499; 47 Cal. 154: unnecessary, where no relief as against estate, 42 Cal. 179; 45 Cal. 433: changes in statutes, see Hib. S. & L. Soc. v. Jordan, May 19th, 1880; 5 Pac. C. L. J. 391.

§ 1501. The time during which there shall be a vacancy in the administration must not be included among any limitations herein prescribed.

Period of vacancy—in administration, not counted, 10 Cal. 386; 19 Cal. 85.

§ 1502. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required.

Action pending at death—where death after verdict, claim need not be presented, 50 Cal. 42, and see sec. 1506; non-presentation of claim, objection waived, My. P. Rep. 61; 52 Cal. 225.

§ 1503. Whenever any claim is presented to an executor or administrator, or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed. [In effect April 16th, 1880.]

Claim—sec. 1493n.

§ 1504. A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment. [In effect April 16th, 1880.]

Judgment against executor, etc.—by default, 9 Cal. 136: where attachment, 29 Cal. 359; 50 Cal. 365, 367: interest, 18 Cal. 377: where defendants are joint obligors, see under next note.

Payable in due course of administration—proper form of judgment, 29 Cal. 363; 32 Cal. 396; 34 Cal. 226: but absence not injurious, 3 Cal. 127; 13 Cal. 136: on death of one of several joint obligors, 42 Cal. 31; 50 Cal. 530; amendment of judgment where personal, 46 Cal. 304.

No execution issuable—on judgment, 32 Cal. 376; 34 Cal. 224; 33 Cal. 78.

§ 1505. When any judgment has been rendered for or against the testator, intestate in his lifetime, no execution shall issue thereon after his death, except as provided in section six hundred and eighty-six. A judgment against

the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate during his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in the same manner and with like effect as if the judgment debtor were still living. [In effect March 28th, 1874.]

Application of section—to foreclosure of mortgage, 9 Cal. 124; 14 Cal. 640.

Judgment against decedent—limitation of, 19 Cal. 97; claim when may be presented by absent creditor, 22 Cal. 95.

Sold for the satisfaction thereof—generally, 37 Cal. 143; when execution void, no satisfaction, 52 Cal. 345.

§ 1506. A judgment rendered against a decedent after verdict or decision on an issue of fact, but before a judgment is rendered thereon, is not a lien on the property of the decedent, but is payable in due course of administration.

§ 1507. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person to be approved by the Superior Court, or a judge thereof. Upon filing the agreement and approval of such court or judge, in the office of the clerk of the court for the county in which the letters testamentary or of administration were granted, the clerk must enter a minute of the order referring the matter in controversy to the person so selected; or, if the parties consent, a reference may be made in the court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it had been allowed or rejected by the executor or administrator or judge. [In effect July 16th, 1880.]

§ 1508. The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge c

in actions against executors or administrators, and the judgment of the court thereon shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process.

Reference—secs. 633-645.

§ 1509. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

Object of section—§ Cal. 169.

Allowed him in his administration accounts—§ Cal. 669.

§ 1510. If the executor or administrator is a creditor of the decedent, his claim duly authenticated by affidavit must be presented for allowance or rejection to a judge of the Superior Court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recover no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court. [In effect April 16th, 1880.]

Claim of executor, etc.—sole difference from that of ordinary creditor, 10 Cal. 482.

Time for presentation—same as for other claims, 10 Cal. 482; 16 Cal.

§ 1511. If an executor or administrator neglects, for seven months after his appointment, to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment.

§ 1512. At the same time at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court, or a judge thereof, and from time to time thereafter he must present a statement of claims subsequently presented to him, if so required by the court, or a judge thereof. In all such statements he must designate the names of the creditors, the nature of each claim, when it be-

came due, or will become due, and whether it was allowed or rejected by him. [In effect April 16th, 1880.]

Statement of claims—claim generally, sec. 1493*n*.

§ 1513. If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount thereof accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to existing debts, unless the creditor consent to accept the amount. [In effect July 1st, 1874.]

Interest—sec. 1494*n*: stopping, My. P. Rep. 239.

Without presentation of claim—pledge redeemed, My. P. Rep. 239.

Payment of debts of estate—generally, sec. 1643 *et seq.*

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

- ART. I. SALES IN GENERAL.
 II. SALES OF PERSONAL PROPERTY.
 III. SUMMARY SALES OF MINES AND MINING INTERESTS.
 IV. SALES OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATION THEREOF.

ARTICLE I.

SALES IN GENERAL.

1516. Personal estate first chargeable. Real estate, when sold.
 1517. No sales valid except by order of Superior Court.
 1518. Applications for orders of sale.
 1519. But one petition, order, and sale must be had when it is possible to do so.

§ 1516. All the property of a decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, except as otherwise provided in this Code, and in the Civil Code. And the said property, personal and real, may be sold as the court may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes. [In effect July 1st, 1874.]

All property chargeable for debts, etc.—Civil Code, sec. 1358: order of appropriation, Civil Code, sec. 1359.

Personal and real property—appropriated without distinction, see c. 1563.

Sold as the court may direct—sec. 1517.

§ 1517. No sale of any property of an estate of a decedent is valid unless made under order of the Superior Court, except as otherwise provided in this chapter. All sales must be under oath reported to and confirmed by the court before the title to the property sold passes. [In effect April 16th, 1880.]

Restrictive language of section—9 Cal. 127.

Sales to which section inapplicable—14 Cal. 642; 18 Cal. 291; 21 Cal. 24.

Sales by executors—of real property, 49 Cal. 490: under will, 50 Cal. ; where broker employed, My. P. Rep. 86.

§ 1518. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate subsequent proceedings, if the defect be supplied by proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale. [In effect July 1st, 1874.]

Irregularity in sale—no collateral attack for, 22 Cal. 265.

§ 1519. When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate of every character, to pay the family allowance, expenses of administration, and debts, there must be but one petition filed, but one order of sale made, but one sale had, except in the case of perishable property which may be sold as provided in section fifteen hundred and twenty-two. The court, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and if there be more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required by section fifteen hundred and thirty-seven. [In effect April 16th, 1880.]

Orders—generally, in probate matters, sec. 1704.

One petition—for realty, sale of personalty on, secs. 1536, 1639.

ARTICLE II.

SALES OF PERSONAL PROPERTY.

- 1522. Perishable and depreciating property to be sold.
- 1523. Order to sell personal property.
- 1524. Partnership interests and choses in action, how sold.
- 1525. Order of sale, what to direct and what to be first sold.
- 1526. Sale of personal property.

§ 1522. At any time after receiving letters, the executor, administrator, or special administrator may apply to the court or judge and obtain an order to sell perishable and other personal property likely to depreciate in value or which will incur loss or expense by being kept, and such other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible

for the property, unless, after making a sworn return and on a proper showing, the court shall approve the sale.

Petition—sec. 1518.

Order for the sale—sec. 1525.

§ 1523. If claims against the estate have been allowed, and a sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application from time to time, so long as any personal property remains in his hands, and a sale thereof is necessary. If it appear for the best interests of the estate, he may, at any time after filing the inventory, in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not. [In effect April 16th, 1880.]

Notice by advertising—see sec. 1705.

§ 1524. Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interests in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

Partnership interest—sec. 1535.

§ 1525. If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct. [In effect July 1st, 1874.]

Special bequest—sold for debts, 48 Cal. 191.

§§ 1526-30 SALES AND CONVEYANCES.

§ 1526. The sale of personal property must be made at public auction for such money or currency as the court may direct, and after public notice given for at least three days by notices posted in three public places in the county or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold, unless for good reason shown to the court, or a judge thereof, orders a private sale or a short notice. Public sales of such property must be made at the court-house door, or at the residence of the decedent, or at some other public place; but no sale shall be made of any personal property which is not present at the time of sale, unless the court otherwise order. [In effect April 16th, 1880.]

Sale of personal property—on insufficient notice, at least void. 17 Cal. 340.

Public sale—private, objectionable, 12 Cal. 191.

Notice by posting—required when, 17 Cal. 340.

ARTICLE III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

§ 1529. Mines may be sold, how.

§ 1530. Petition for sale, who may file and what to contain.

§ 1531. Order to show cause, how made and on what notice.

§ 1532. Order of sale, when and how made.

§ 1533. Further proceedings to conform to articles two and four.

§ 1529. When it appears from the inventory of the estate of any decedent that his estate consists in whole or in part of mines, or interests in mines, such mines or interests may be sold under the order of the court having jurisdiction of the estate, as hereinafter provided. [In effect April 16th, 1880.]

§ 1530. The executor or administrator, or any heir, law, or creditor of the estate, or any partner or member of any mining company, in which interests or shares are held or owned by the estate, may file in the court a petition, in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest, or shares which it is desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company in which such interests or shares are held, and the grounds upon which the sale is asked to be made. [In effect April 16th, 1880.]

Petition for sale of stocks—disregarding surplusage in, 22 Cal. petition for sale, generally, sec. 1518.

Condition of the mining interests—petition defective for not describing, see Estate of Boland, July 21st, 1880, 5 Pac. C. L. J. 708.

§ 1531. Upon the presentation of such petition, the court, or a judge thereof, must make an order directing all persons interested to appear before such court, at a time and place specified, not less than four or more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mine, mining interests, shares, or stocks, as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as such court or judge shall specify. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with. [In effect April 16th, 1880.]

Publication of notice—sec. 1705.

Reasonable notice—of sale of stocks, construed, 22 Cal. 266.

§ 1532. If, upon hearing the petition, it appears to the satisfaction of the court that it is to the interest of the estate that such mining property or interests of the estate should be sold, or that an immediate sale is necessary in order to secure the just rights or interests of the mining partners, or tenants in common, such court must make an order authorizing the executor or administrator to sell such mining interests, mines, or shares, as herein-after provided. [In effect April 16th, 1880.]

§ 1533. After the order of sale is made, all further proceedings for the sale of such mining property, and for the notice, report, and confirmation thereof, must be in conformity with the provisions of article four of this chapter.

ARTICLE IV.

THE SALE OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATION THEREOF.

- 1536. To sell real estate, when.
- 1537. Verified petition for sale, what to contain and to what it may refer.
- 1538. Order to persons interested to appear.
- 1539. Copy to be served, assent given, or publication made.
- 1540. Hearing after proof of service. Presentation of claims.
- 1541. Administrator, executor, and witnesses may be examined.
- 1542. To sell real estate or any part, when.
- 1543. Order of sale, when to be made.

- § 1544. What the order of sale must contain. May be at public or private sale.
- § 1545. Interested persons may apply for order of sale. Form of petition.
- § 1546. To deliver copy of order to executor.
1547. Notice of sale.
1548. Time and place.
- § 1549. Private sale of real estate, how made, and notice. Bids, and how received.
- § 1550. Ninety per cent. of appraised value must be offered.
1551. Purchase-money on sale on credit, how secured.
1552. Hearing and setting aside sale, and when resale may be ordered.
1553. May file objections, when and who.
1554. When order of confirmation is to be made and when not.
1555. Conveyances.
1556. Order of confirmation, what to state.
1557. Sale may be postponed.
1558. Notice of postponement.
1559. Sale of real estate to pay legacies.
1560. Where payment of debts, etc., provided for by will.
1561. Sale without order. May require security.
1562. Where provision by will insufficient.
1563. Estate subject to debts, etc.
1564. Contribution among legatees.
1565. Contract for purchase of lands may be sold, how.
1566. Conditions of sale.
1567. Purchaser to give bond.
1568. Executor to assign contract.
- § 1569. Sales by executors or administrators of lands under mortgage or lien.
- § 1570. The holder of the mortgage or lien may purchase the land. His receipt to the amount of his claim a valid payment.
- § 1571. Administrator and executor liable for misconduct in sale.
1572. Fraudulent sales.
1573. Limitation of actions for vacating sale, etc.
1574. To what cases preceding section not to apply.
1575. Account of sale to be returned.
- § 1576. Executor, etc., not to be purchaser.

§ 1536. When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses or charges of administration, or legacies, the executor or administrator may also sell any real as well as personal property of the estate for that purpose, upon the order of the court; and an application for the sale of real property may also embrace the sale of personal property. [in effect April 16th, 1880.]

Sale of realty—authorized, sec. 1516: interest under contracts not to be included, sec. 1565: additional bond on, sec. 1389 and note.

Legislative enactments—as to real estate sales, when unconstitutional, 39 Cal. 179; 50 Cal. 388.

Substantial compliance with statute—sufficient, 16 Cal. 473.

Debts outstanding against the decedent—proof of existence—Cal. 315: objection that estate not chargeable, not to be raised collaterally, 49 Cal. 437: cover mortgage by married woman to secure husband's debt, My. P. Rep. 184.

Expenses of administration—sale for, 33 Cal. 658.

§ 1537. To obtain such order for the sale of real property, he must present a verified petition to the Superior Court, or a judge thereof, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof, and whether the same be community or separate property; the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree. [In effect April 16th, 1880.]

Verified petition—want of verification, held fatal in Estate of Boland, July 21st, 1880, 5 Pac. C. L. J. 708: when by any other person, sec. 545: for sale of property generally, sec. 1515: contents of, 16 Cal. 473; 20 Cal. 288; Richardson v. Musser, Feb. 23rd, 1880, 5 Pac. C. L. J. 70, and see next note: where sale to meet expenses of administration, 33 Cal. 58; 36 Cal. 687.

Jurisdictional facts—nature, and need of stating, 13 Cal. 562; 16 Cal. 73; 19 Cal. 189, 397; 20 Cal. 288; 50 Cal. 388; Estate of Boland, July 21st, 1880, 5 Pac. C. L. J. 708: redundant matter may be rejected, 19 Cal. 189.

Description of real property—19 Cal. 189.

Condition of property—must be set forth in petition, 20 Cal. 288; 1 Cal. 563; Estate of Boland, July 21st, 1880, 5 Pac. C. L. J. 708.

Reference to inventory—sufficient, 36 Cal. 687.

Subsequent proceedings not invalidated—provisions inapplicable, when, 51 Cal. 563: by defects and irregularities not jurisdictional, 16 Cal. 73.

§ 1538. If it appears to the court or judge, from such petition, that it is necessary to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed and an order thereupon made, directing all persons interested in the estate to appear before the court, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should

not be granted to the executor or administrator to sell much of the real estate of the decedent as is necessary.

Necessity for sale—33 Cal. 666: held that personal property must be sold if real estate is inadequate, 20 Cal. 288; but now, see sec. 1516

Purposes, etc.—or any of them, 36 Cal. 690.

§ 1539. A copy of the order to show cause must be personally served on all persons interested in the estate, including the general guardian of a minor so interested, and the legatee, or devisee, or heir of the decedent, provided they are residents of the county, at least ten days before the time appointed for hearing the petition, or be published for four successive weeks in such newspaper in the county as the court or judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time. [In effect July 1st, 1874.]

Notices to all persons interested—requirements of section, see Cal. 635: personal service of, see secs. 1011, 1707-1709, 1710; 16 Cal. 45: publication of, sec. 1705; 33 Cal. 45: to attorney for minor heirs, under former statute, *Richardson v. Musser*, Feb. 23rd, 1880, 5 Pac. C. L. 100.

General guardian of minor—if administrator, must not represent, 33 Cal. 45.

Statement of title—in notice of sale, purchaser should not depend upon, 9 Cal. 181.

§ 1540. The court, at the time and place appointed by such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proof of the petitioners, and of all persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing. [In effect April 16th, 1880.]

Opposing application—parties, grounds, etc., *My. P. Rep. 7*; 46 Cal. 304.

Claims passed on—heirs may dispute their validity, 7 Cal. 215.

§ 1541. The executor, administrator, and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the court or judge, in the same manner and with like effect as in other cases. [In effect April 16th, 1880.]

Procuring attendance, etc.—sec. 1965 *et seq.*

§ 1542. If it appears necessary to sell a part of the real estate, and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interest of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or of any part thereof necessary and for the best interest of all concerned.

Sale of whole of real estate—order for, when not collaterally attackable, 29 Cal. 20.

§ 1543. If the court is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this article, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition, as the court shall judge necessary or beneficial.

Order for sale—error in, 29 Cal. 43; effect of, 20 Cal. 121; contents of, sec. 1544 and note; void for want of jurisdiction, 33 Cal. 45; when not renewable, 33 Cal. 665.

§ 1544. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or on a credit not exceeding one year, payable in gross or in installments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled

to sell, by order of the court, made on motion, after notice, by any party interested.

Contents of order—sec. 1704; 16 Cal. 503; 20 Cal. 121.

Sale in pursuance of agreement—16 Cal. 474.

Employment of brokers—and commissions on, My. P. Rep. 86.

§ 1545. If the executor or administrator neglect to apply for an order of sale when it is necessary, any person may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator, before the sale being made. The petition of such applicant must contain many of the matters set forth in section fifteen hundred and thirty-seven as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale.

§ 1546. Repealed July 1st, 1874.

§ 1547. When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct for three weeks successively next before the sale; the lands and tenements to be sold must be described with common certainty in the notice.

Three weeks' publication of notice—what constitutes, My. P. Rep. 153.

§ 1548. Sales at public auction must be made in the county where the land is situated, but when the land is situated in two or more counties it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

Postponement of sale—secs. 1557, 1558.

§ 1549. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county; if none, then in such paper as the court or a judge thereof may direct for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which

sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it be shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice, in which case the notice of sale, and the sale, may be made to correspond with such order. [In effect April 16th, 1880.]

§ 1550. No sale of real estate at private sale shall be confirmed by the court, unless the sum offered is at least ninety per cent. of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

§ 1551. The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase-money, with a mortgage on the property to secure their payment.

Credit sale—interest, 9 Cal. 181.

Payment by offset—on mortgage claim, 39 Cal. 306.

§ 1552. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk, at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge

shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court shall examine the return and witnesses in relation to the sale, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court shall vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of a sum per cent. more in amount than that named in the return be made to the court in writing, by a responsible person, it is in the discretion of the court to accept such offer, to confirm the sale to such person, or to order a new sale. [Effect April 16th, 1880.]

Sales under will—sec. 1561.

Notice of petition for confirmation of sale—description of property by reference in, sec. 1712.

Hearing—provision designed only to secure fair price, 20 Cal. 1.

Increased bid—48 Cal. 383; 49 Cal. 490.

§ 1553. When return of the sale is made and filed, the person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon when the return is heard by the court or judge, and may produce witnesses in support of his objections.

Objection by person interested—sureties on additional bond at insolvent, 50 Cal. 308; waiver of, 49 Cal. 497.

§ 1554. If it appears to the court that the sale was lawfully made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section fifteen hundred and fifty-two be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it and directing the conveyances to be executed, must be recorded in the office of the recorder of the county in which the land sold is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and a notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

Power to confirm sale—only where jurisdiction has attached, 19 Cal. 410; 33 Cal. 45.

Order confirming sale—object of requiring, 20 Cal. 121; when void, 33 Cal. 45; proof of notice before, and recital in, sec. 1556; recording certified copy, sec. 1719.

Sale to substituted bidder—valid, 9 Cal. 181.

Resale—ordered on purchaser's default, My. P. Rep. 153.

Vacating order of confirmation—insufficient ground for, My. P. Rep. 222; want of legal notice, justifies, 49 Cal. 490.

§ 1555. Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest, also passes by such conveyances. [In effect April 16th, 1880.]

Conveyances—execution enforced, 39 Cal. 306; title acquired by, 9 Cal. 128, 181; 49 Cal. 497; invalid where petition did not give jurisdiction, 19 Cal. 410; 20 Cal. 238.

§ 1556. Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

Notice of sale—proof of, before confirmation, 33 Cal. 54; generally, secs. 1547, 1549.

§ 1557. If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

§ 1558. In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting notices in three or more public places in the

county where the land is situated, or publishing the same in a newspaper of general circulation, or both, as the time and circumstances will admit.

Publishing notice—sec. 1705.

§ 1559. Repealed July 1st, 1874.

§ 1560. If the testator makes provision by his will for the payment of his debts, the expenses of administration, or for the payment of family expenses, they must be paid according to such provision, or designation, out of the estate thus appropriated, so far as the same is sufficient.

Insufficient provision—in will, effect of, sec. 1562.

Payment of debts and expenses—generally, sec. 1516: order of payment, sec. 1562: appropriation, Civil Code, sec. 1359.

Testator's power to change order—31 Cal. 606.

§ 1561. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate with the order of the court, and at either public or private sale, and with or without notice, as the executor may think proper; but the executor must make return of such sales, as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court. [In effect April 16th, 1880.]

Sales by testamentary authority—no order necessary, 14 Cal. 15; 18 Cal. 249; 18 Cal. 292; 21 Cal. 31; 49 Cal. 490: directory provision in will, 32 Cal. 438: title by executor's deed, 13 Cal. 592; 21 Cal. 43: agency of power, 1 Cal. 488; 30 Cal. 567: at private sale, valid, 1 Cal. 490.

Conduct of sale—49 Cal. 490; 50 Cal. 97.

Return as in other cases—49 Cal. 490; 50 Cal. 97.

Confirmation of sale—when not necessary, My. P. Rep. 9; 49 Cal. 495: when beyond power of court, 50 Cal. 97: when necessary, 49 Cal. 490.

§ 1562. If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, the expenses of administration, and family expenses, the portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter.

Order of appropriation—of estate not disposed of by will, MARSHALING ASSETS, sec. 1563n.

§ 1563. The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to

value or amount of the several devises or legacies; but specific devises or legacies are exempt from such liability, if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

Real and personal property—allike chargeable, sec. 1516: formerly otherwise, 3 Cal. 595; 48 Cal. 193.

Specific devises—change in construction as to, 31 Cal. 595: exempt only if other sufficient estate, 33 Cal. 658.

Marshaling assets—31 Cal. 595.

Special bequest—sold for payment of debts, 48 Cal. 191.

§ 1564. When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution. [In effect April 16th, 1880.]

§ 1565. If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land; and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seized, except as hereinafter provided.

§ 1566. The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the court until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court or judge shall approve. [In effect April 16th, 1880.]

§ 1567. The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled, against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract.

§ 1568. Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale; and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living.

§ 1569. When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of land subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase-money must be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase-money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase-money has been actually so applied. No claim against any estate, which has been presented and allowed, is affected by the Statute of Limitations pending the proceedings for the settlement of the estate. The purchase-money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and lawful costs and charges thereon, may be paid into court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase-money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs. [In effect Act of 1880, § 16th, 1880.]

Sale of mortgaged land—character of provision for, 18 Cal. 686; **title under,** 46 Cal. 200; **application of proceeds,** 18 Cal. 686.

Valid claim—against estate of decedent, see secs. 1493, 1497, 1498; **Cal. 412:** where claim rejected, 9 Cal. 124.

Paid into court—see secs. 572-74, 2104.

§ 1570. At any sale, under order of the court, of land upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment in full. *tanto*. If the amount for which he purchased the property

erty is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court, or the clerk thereof, an amount sufficient to pay such expenses. [In effect April 16th, 1880.]

Mortgage-holder as purchaser—crediting debt as payment, 39 Cal. 96.

§ 1571. If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

Bond of executor, etc.—sec. 1388*n et seq.*

§ 1572. Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

Fraudulently sells—prohibited connection with sale, sec. 1576.

§ 1573. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based. [In effect April 16th, 1880.]

Persons under disability—provision inapplicable to, see sec. 1574.

Sales embraced—in enactment, 33 Cal. 515.

Next after settlement of final account—before amdt. 1880, after sale, 29 Cal. 620.

Discovery of the fraud—within three years of, see sec. 338, subd. 4; 9 Cal. 20.

Bar of statute—must be pleaded, 20 Cal. 620.

§ 1574. The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability.

§ 1575. When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court, within thirty days

thereafter, an account of sales, verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, on notice having been first given him to appear and state the cause why such attachment should not issue, or such execution should not be made. [In effect April 16th,

Within thirty days—amdt. 1880, pursuant to abolition of term 73n.

Attachment for contempt—sec. 1212 *et seq.*

Notice by citation—sec. 1710; also, secs. 1707-1709.

§ 1576. No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

Purchase by administrator, etc.—subsequent conveyance otherwise, effect of, 29 Cal. 19; 36 Cal. 146; 41 Cal. 411: of any claim against estate, forbidden, sec. 1617.

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

1581. Executors to take possession of the entire estate.
 1582. Executors may sue and be sued for recovery of property.
 1583. May maintain actions for waste, conversion, and trespass.
 1584. Executor and administrator may be sued for waste or trespass of decedent.
 1585. Surviving partner to settle up business. Interest therein to be appraised. Account to be rendered.
 1586. Actions on bond of executor or administrator may be brought by another administrator.
 1587. What executors are not parties to actions.
 1588. May compound.
 1589. Recovery of property fraudulently disposed of by testator.
 1590. When executor to sue, as provided in preceding section.
 1591. Disposition of estate recovered.

§ 1581. The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in his title.

Possession of estate—by executor, etc., sec. 1452 and note, 8 Cal. 9; 15 Cal. 259; 19 Cal. 87; 20 Cal. 620; 31 Cal. 604; 33 Cal. 392.

Collection of debts—when no liability for failure, sec. 1615.

Heirs or devisees—rights of, as to possession, suits, etc., sec. 1452n; Cal. 215; 18 Cal. 458; 19 Cal. 87; 33 Cal. 179: ejectment, cannot maintain while administration unclosed, 20 Cal. 620; 42 Cal. 462; 47 Cal. 168; Cal. 147: suits to quiet title, generally, sec. 738 and notes.

Executor or administrator—suits by and against, secs. 1582-1584, 1585-1587, 1589, 1590: consent of, when not binding on heirs, 50 Cal. 471.

§ 1582. Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

Executors and administrators—Suits by, after substitution, 385 and notes; without joining beneficiaries, sec. 369; together with cotenants of deceased, 20 Cal. 620; 21 Cal. 208; 31 Cal. 33; 45 Cal. 309; for conversion of personalty, 24 Cal. 170; 50 Cal. 369; ejectment maintainable, 14 Cal. 117. *Suits against*, parties, 8 Cal. 580; 50 Cal. 369; costs, sec. 1509.

§ 1583. Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime.

Conversion—14 Cal. 250; 16 Cal. 574; 53 Cal. 713.

Trespass upon realty—19 Cal. 113.

§ 1584. Any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate who in his lifetime wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person or committed any trespass on the real estate of such person.

Administrator—when liable as trustee, 7 Cal. 348; effect of judgment against, 9 Cal. 130.

Personal tort—of decedent, administrator not liable for, 38 Cal. 567.

Conversion—survival of cause of action for, 28 Cal. 567.

§ 1585. When a partnership exists between the decedent, at the time of his death, and any other person surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator to the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. [In effect April 1880.]

Surviving partner—authority under section, 16 Cal. 118; in case of, 38 Cal. 385.

Interest of decedent—in partnership, may be sold, sec. 1524.

Settlement and account—by surviving partner, 26 Cal. 51; 263.

ances—to be paid over, 34 Cal. 263.

Administrator, etc.—not to conduct business, 28 Cal. 51.

Admission—by administrator, where brought, 9 Cal. 636; but see SUCCEDED COURTS, sec. 76a.

Community property—liability for partnership debts, 50 Cal. 636.

1586. An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any other administrator of the same estate.
Bond of executor or administrator—sec. 1388 *et seq.*

1587. In actions by or against executors, it is not necessary to join those as parties to whom letters were granted, but who have not qualified.

Co-defendants joined in actions—secs. 379, 382.

1588. Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court, or a judge thereof, may be appointed to stand bound with him and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interest of the estate. [In effect April 1, 1880.]

Insolvency—sec. 1822.

1589. When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds and conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

Section inapplicable—when, 53 Cal. 715.

Property fraudulently transferred—suit to recover, section interpreted, 31 Cal. 442; 48 Cal. 393; when and by whom action brought, 50 Cal. 299; further provisions, secs. 1590, 1591.

1590. No executor or administrator is bound to sue on behalf of such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of cred-

itors, who must pay such part of the costs and expense of the suit, or give such security to the executor or administrator therefor, as the court, or a judge thereof shall direct. [In effect April 16th, 1880.]

§ 1591. All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator. [In effect April 16th, 1880.]

CHAPTER IX.

**OF THE CONVEYANCE OF REAL ESTATE
BY EXECUTORS AND ADMINISTRATORS
IN CERTAIN CASES.**

597. Executor to complete contracts for sale of real estate.
 598. Petition for executor to make conveyance, and notice of hearing.
 599. Interested parties may contest.
 600. Conveyances, when ordered to be made.
 601. Execution of conveyance and record thereof, how enforced.
 602. Rights of petitioner to enforce contract.
 603. Effect of conveyance.
 604. Effect of recording a copy of the decree.
 605. Recording decree does not supersede power of court to enforce it.
 606. Where party to whom conveyance to be made is dead.
 607. Decree may direct possession to be surrendered.

§ 1597. When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto. [In effect April 16th, 1880.]

Construction of section—as to jurisdiction, 49 Cal. 469.

Real estate under contract to convey—not affected by will, 32 Cal.

§ 1598. On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court, or a judge thereof, must appoint a time and place for hearing the petition, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this State as he may designate. [In effect April 16th, 1880.]

Verified petition—by whom, 41 Cal. 308; verification of pleadings, c. 446.

Publication of notice—sec. 1705.

§ 1599. At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof by affidavit or otherwise

CODE CIV. PROC.—44.

of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before it for that purpose.

§ 1600. If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereon to the petitioner must be made, entered on the minutes of the court, and recorded.

§ 1601. The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the clerk in the office of the recorder of the county where the land lies, and is *prima facie* evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance. [In effect July 1, 1874.]

§ 1602. If, upon hearing, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the right of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce a specific performance thereof. [In effect April 16th, 1880.]

§ 1603. Every conveyance made in pursuance of a decree as provided in this chapter, shall pass the title to the estate contracted for, as fully as if the contractor party himself was still living, and executed the conveyance. [In effect April 16th, 1880.]

Conveyances—by executor, etc., sec. 1555.

§ 1604. A copy of the decree for a conveyance, as provided in this chapter, duly certified and recorded in the office of the recorder of the county where the land lies, gives the person entitled to the conveyance a right to possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree. [In effect April 16th, 1880.]

§ 1605. The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process.

§ 1606. If the person entitled to the conveyance dies before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

§ 1607. The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the decree. When, by the terms of the contract, possession is to be surrendered.

CHAPTER X.

ACCOUNTS, AND OF PAYMENT OF DEBTS.

ARTICLE I.

LIABILITIES AND COMPENSATION OF EXECUTORS.

1612. When executor or administrator personally liable.
 1613. Executor to be charged with all estate, etc.
 1614. Not to profit or lose by estate.
 1615. Uncollected debts without fault.
 1616. Compensation of the executor and administrator.
 1617. Not to purchase claims against the estate.
 1618. Executor's and administrator's commissions.

§ 1612. No executor or administrator is charged upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person bound thereunto specially authorized.

Compare—sec. 1973, subd. 2.

§ 1613. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the time of the appraisement contained in the inventory, except as provided in the following sections, and with all the debts, interest, profit and income of the estate.

Chargeable with the whole of the estate—but not for loss to co-executor, 33 Cal. 659; responsible for kind of money received, 667, 1407; 26 Cal. 429; reducing money in bank to possession, discharge, 44 Cal. 589; liability for rents, 6 Cal. 806; 37 Cal. 425.

§ 1614. He shall not make profit by the increase or suffer loss by the decrease or destruction, without fault, of any part of the estate. He must account for any excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss if the sale has been justly made.

Fiduciary capacity—money held in, by executor, etc., 26 Cal.

Accountability for profit made—37 Cal. 424.

Liability for losses—48 Cal. 627; 52 Cal. 477.

Mingling trust funds—liable for interest or profits, 37 Cal. 424; 42 Cal. 290; but commingling must clearly appear, My. 1866; 37 Cal. 424; compound interest exacted, 52 Cal. 403; 53 Cal. 333; see My. P. Rep. 67, 168.

Becoming purchaser—of mortgage at his own sale, liability, sec. 1576; 46 Cal. 564.

§ 1615. No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

Debts appraised as valueless—Uncollected, no ground for revocation of letters, My. P. Rep. 98.

§ 1616. He shall be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument, filed in the court, he renounces all claim for compensation provided by the will. [In effect April 16, 1880.]

Necessary expenses of administration—not for removing incumbrances, 12 Cal. 200; 26 Cal. 50; where litigation, 33 Cal. 659; 38 Cal. 87; Cal. 627; and see next note; costs, sec. 1509; services of employé, 46 Cal. 564; brokerage, amount fixed by court, My. P. Rep. 86.

Reasonable attorney's fees—amount discretionary, 42 Cal. 238; when allowed, 38 Cal. 87; 46 Cal. 534; where loan contrary to will, not allowed, 43 Cal. 627; before this provision, not for procuring letters, 43 Cal. 543; in executor's own behalf, not allowed, My. P. Rep. 123, 168; incurred by previous executor, allowed, My. P. Rep. 163.

Compensation for services—commissions, where no provision in will, etc., sec. 1618.

§ 1617. No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

Liability of executor, etc.—for purchasing property of estate, sec. 1616; for fraudulently selling realty, sec. 1572. Claim—sec. 1493 n.

§ 1618. When no compensation is provided by the will, and the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: for the first thousand dollars, at the rate of seven per cent.; for all above that sum, and not exceeding ten thousand dollars, at the rate of five per cent.; for all above ten thousand dollars, and not exceeding twenty thousand dollars, at the rate of four per cent.; for all above twenty thousand dollars, and not exceeding fifty thousand dollars, at the rate of three per cent.; for all above fifty thousand dollars, and not exceeding one hundred thousand dollars, at the rate of two per cent.; and for all above one hundred thousand dollars, at the rate of one per cent. The same commissions shall be allowed to administrators. In all cases, such further allowance may be made as the court may deem just and

reasonable for any extraordinary service, but the amount of such extra allowance must not exceed half the amount of commissions allowed by this section. Where the property of the estate is distributed and involves no labor beyond the custody and distribution of the same, the commission shall be computed on the estate above the value of twenty thousand dollars at one-half of the rates fixed in this section. Public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators. All contracts between an executor or administrator and an heir, devisee, or legatee, for a higher compensation than that allowed by this section, shall be void; provided that this act shall not apply to estates now in course of administration, except where, and to the extent that, such estates consist of bonds and other securities, to be distributed without extra expense in administration. [In force March 4th, 1881.]

Amount of the whole estate—accounted for, is basis of commissions, 30 Cal. 113; 43 Cal. 543; homestead not reckoned, My. P. Rep. 10; but see 30 Cal. 105; supposed assets held until title determined, 13 Cal. 134.

Apportionment of commission—between successive administrators, 3 Cal. 289; but made only when estate ready for distribution, *State of Barton*, June 16th, 1880, 5 Pac. C. L. J. 511; when not between executors, 24 Cal. 92.

Commissions—not to be set off against indebtedness to intestate, Cal. 564; allowable only on final account, 46 Cal. 564; not allowed acting under void letters testamentary, 52 Cal. 658.

Further allowance—for extraordinary services, My. P. Rep. 10.

ARTICLE II.

ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

- § 1622. Exhibit of receipts and disbursements, and claims allowed.
- 1623. Citation to account at third term.
- 1624. Petition for citation to render final or other account.
- 1625. Citation to account on application.
- 1626. Objections to account, who may file.
- 1627. Attachment for not obeying citation.
- 1628. To render accounts at expiration of term.
- 1629. Executor to account after his authority revoked.
- 1630. Revoking authority of executor, when.
- 1631. To produce and file vouchers, which remain in court.
- 1632. Vouchers for items less than twenty dollars, when accepted.
- 1633. Day of settlement to be appointed, and notice thereof.
- 1634. Final settlement, partition and distribution made at same time.
- 1635. Interested party may file exceptions to account.
- 1636. All matters may be contested by the heirs. Hearing.
- 1637. Settlement of accounts to be conclusive, when and where.
- 1638. Proof of notice of settlement of accounts.
- 1639. Sale of personal property.
- 1640. Moneys invested by order of court.

§ 1622. Six months after his appointment, and at any time when required by the court, either upon his own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs. [In effect April 16th, 1880.]

Within six months—amdt. 1880: previously at third term, but see notes to sec. 73, as to abolition of terms.

§ 1623. If the executor or administrator fails to render an exhibit for six months after his appointment, the court, or a judge thereof, must cause a citation to be issued requiring him to appear and render it. [In effect April 16th, 1880.]

Citation—secs. 1707, 1711.

§ 1624. Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the court, or a judge thereof, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made. [In effect April 16th, 1880.]

§ 1625. If the court, or a judge thereof, is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear, at some day to be named in the citation, and render an exhibit as prayed for. [In effect April 16th, 1880.]

§ 1626. When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

Any person interested—see sec. 1635n.

Revocation for misconduct—sec. 1436 *et seq.*

§ 1627. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against

him, and such exhibit enforced, or his letters may be revoked, in the discretion of the court.

Contempt—secs. 1209, 1219.

§ 1628. Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account, the court or judge must compel the rendering of the account by attachments, and any person interested in the estate may apply for and obtain an attachment; but no attachment may be issued unless a citation has been first issued, served, and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account. [Approved March 11th, 1876—ninety days.]

Account of administration—final, secs. 1647, 1652: separate, by executor, etc., 24 Cal. 92: by administrator of an administrator, 42 Cal. 124: time for filing accounts, merely directory, My. P. Rep. 98.

§ 1629. When the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court, at the instance of any person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator. [In effect April 16th, 1880.]

Sureties on guardian's bond—no liability until accounts set aside, 52 Cal. 636.

§ 1630. If the executor or administrator resides out of the county, or absconds or conceals himself so that a citation cannot be personally served, and neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed to the attachment has been executed, his letters must be revoked.

§ 1631. In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, and must remain in the court; and he may be examined on oath touching such payments, and also touching the property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot

be produced on the settlement, the payment may be proved by the oath of any competent witness.

Vouchers—required of claimant, sec. 1494: lacking, see sec. 1632; 37 Cal. 424.

§ 1632. On the settlement of his account he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate, and if, upon such settlement of accounts, it appear that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or sections one thousand and four hundred and ninety-four, one thousand four hundred and ninety-five, and one thousand four hundred and ninety-six of this Code, and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-off, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts. [In effect April 16th, 1880.]

Debts paid without required affidavit and allowance—ratification of action, amdt. 1880.

§ 1633. When any account is rendered for settlement, the court, or a judge thereof, must appoint a day for the settlement thereof; the clerk must thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper. [In effect April 16th, 1880.]

§ 1634. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said accounts, the notice of the settlement must state those facts, which notice must be given by posting or publication as the court may direct, and for such time as may be ordered. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice or proceedings. [Approved March 11th, 1876—ninety days.]

§ 1635. On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his objections in writing to the account, and contest the same.

Any person interested—26 Cal. 57; 29 Cal. 519; 49 Cal. 111.

Contest the account—proceedings generally, 30 Cal. 110.

§ 1636. All matters, including allowed claims, which are passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of distribution, may be contested by the heirs, for cause shown. Any hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts, and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

Referees—secs. 638-645.

§ 1637. The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is *prima facie* evidence of its correctness. [In effect July 1st, 1874.]

Settlement of account—not a judgment, My. P. Rep. 127; re appeal, 30 Cal. 105.

Conclusiveness of settlement—of account, 53 Cal. 403; Reyn. Brunagim, March 4th, 1880, 5 Pac. C. L. J. 115; when right to claim not barred, My. P. Rep. 103; estoppel of legatee, 11 Cal. 212; application to guardians, 36 Cal. 654; application to annul account, 37 Cal. 259.

Reopening account—of administrator, when no notice, 53 Cal. 259; by minor, My. P. Rep. 186; diligence, requisite showing of, 212; coexecutor may ask for supplemental decree, 24 Cal. 93.

§ 1638. The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

Notice—if lacking, account may be reopened, 53 Cal. 197, 259.

§ 1639. Whenever it appears to the court on any application of an application for the sale of real property, that the sale would be for the interest of the estate that personal

erty of the estate, or some part of such property, should be first sold, the court may decree the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance. [In effect July 1st, 1874.]

§ 1640. Pending the settlement of any estate, on the petition of any party interested therein, and upon good cause shown therefor, the court may order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or of this State. Such order can only be made after publication of notice of the petition in some newspaper, to be designated by the court or a judge thereof. [In effect April 16th, 1880.]

ARTICLE III.

THE PAYMENT OF DEBTS OF THE ESTATE.

- 1643. Order in which debts to be paid.
- 1644. Where property insufficient to pay mortgage.
- 1645. Estate insufficient, a dividend to be paid.
- 1646. Funeral expenses and expenses of last sickness.
- 1647. Order for payment of debts and discharge of the executor and administrator.
- 1648. Provision for disputed and contingent claims.
- 1649. After decree for payment of debts, executor personally liable to creditors.
- 1650. Claims not included in order for payment of debts, how disposed of.
- 1651. Order for payment of legacies and extension of time.
- 1652. Final account, when to be made.
- 1653. Neglect to render final account, how treated.

§ 1643. The debts of the estate, subject to the provisions of section twelve hundred and five, must be paid in the following order:

1. Funeral expenses;
2. The expenses of the last sickness;
3. Debts having preference by the laws of the United States;
4. Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date;
5. All other demands against the estate.

Preferred claims for wages—sec. 1204.

Family allowance—secs. 1467, 1646.

Order of payment—unchangeable, 26 Cal. 51.

Judgment—decree settling account is not, My. P. Rep. 127.

§ 1644. The preference given in the preceding section to mortgages only extends to the proceeds of the prop-

erty mortgaged. If the proceeds of such property are sufficient to pay the mortgage, the part remaining undivided must be classed with other demands against the estate.

Proceeds of property mortgaged—sec. 1569.

§ 1645. If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

§ 1646. The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court.

Surplus funds—application to payment of debts, 37 Cal. 424.

§ 1647. Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as circumstances of the estate require. If there are not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the amount to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, the account must be considered as a final account, and the executor or administrator is entitled to his discharge, upon producing and filing the necessary vouchers and papers showing that such payments have been made, and that he has fully complied with the decree of the court. [Revised March 11th, 1876—ninety days.]

Settlement of accounts—sec. 1623.

Order for payment of debts—My. P. Rep. 109: in particular as to money, 26 Cal. 421; 39 Cal. 70.

§ 1648. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet

appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a *pro rata* distribution is ordered.

Cautionary provision—18 Cal. 429.

§ 1649. When a decree is made by the court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the court, in favor of each creditor, and the same proceedings may be had under such execution as under execution in other cases. The executor or administrator is liable therefor on his bond to each creditor. [In effect April 16th, 1880.]

Decree for payment—executor cannot open, 14 Cal. 129; allowed claim not a judgment, before, 26 Cal. 421; My. P. Rep. 125.

§ 1650. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order for payment, has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section fourteen hundred and ninety-one, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day.

Decree of distribution conclusive—upon creditors, My. P. Rep. 159.

§ 1651. If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give such extension of time as may be reasonable, for a final settlement of the estate.

§ 1652. At the time designated in the last section, or sooner, if within that time all the property of the estate

CODE CIV. PROC.—45.

has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and present for settlement of his administration.

Settlement of accounts—sec. 1628.

§ 1653. If he neglects to render his account, the same proceedings may be had as prescribed in this chapter with regard to the first account to be rendered by him, and the provisions of this chapter relative to the last-mentioned account, and the notice and settlement thereon apply to his account presented for final settlement.

Proceedings to enforce account—secs. 1628-1630.

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES.

- ART. I. PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.
 II. DISTRIBUTION ON FINAL SETTLEMENT.
 III. DISTRIBUTION AND PARTITION.
 IV. AGENTS FOR ABSENT INTERESTED PARTIES. DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

ARTICLE I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

- § 1658. Payment of legacies upon giving bonds.
 § 1659. Notice of application for legacies.
 § 1660. Executor or other person may resist application.
 § 1661. Decree prayed for to require bond, which must be given. May order whole or part of share to be delivered. Where partition necessary, how made. Costs.
 § 1662. Order for payment of bond, and suit thereon.

§ 1658. At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee, may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

Intent of section—20 Cal. 627; 31 Cal. 619; 33 Cal. 666.

Heir—includes widow or survivor, My. P. Rep. 158.

Giving bonds—requisite, 14 Cal. 112.

Payment of legacies—order of appropriation for, Civil Code, sec. 1360.

Proportion of the debts—for which legatee, etc., liable, Civil Code, sec. 1377.

§ 1659. Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

Notice of settlement of account—sec. 1633.

§ 1660. The executor or administrator, or any person interested in the estate, may appear at the time named

§§ 1661-2 PARTITION AND SETTLEMENT.

and resist the application, or any other heir, devisee or legatee may make a similar application for himself.

Any person interested—sec. 1635n.

§ 1661. If, at the hearing, it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee, or devisee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond in such sum as shall be designated by the court, or a judgment thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value of the amount of the legacy or portion of the estate to which he is entitled;

2. The executor or administrator to deliver to the legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition of the estate is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally amongst them. [In effect April 16th, 1880.]

Order—not made if any taxes unpaid, sec. 1669: recording, sec. 1670.

SUBDIVISION 1. Undertakings, generally—sec. 941n.

Partition—manner hereinafter prescribed, sec. 1675 et seq.

§ 1662. When any bond has been executed and delivered under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of the payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

ARTICLE II.

DISTRIBUTION ON FINAL SETTLEMENT.

665. Distribution of estate, how made and to whom.
 666. What the decree must contain, and is final.
 667. Distribution when decedent was not a resident of this State.
 668. Decree to be made only after notice.
 669. No distribution to be ordered till all taxes on personal property are paid.

§ 1665. Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left no surviving child, and the issue of other children, and no child of them, before the close of the administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs-at-law. A statement of all receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court, and included in the order or decree; or the court may order notice of the settlement of such supplementary account, and refer the same as in other cases to the settlement of accounts.

Distribution—Method of, where illegal bequests and mortgaged land. My. P. Rep. 189: how affected by ante-nuptial contract, My. P. Rep. 241: where heir or devisee dies pending administration, My. P. Rep. 252: where adverse claimant to realty, My. P. Rep. 122. *Time of, not postponed till end of period for contest,* 51 Cal. 563; 53 Cal. 94. *Persons entitled to, court determines,* My. P. Rep. 247. *On executor's application, a lien retained for balance due applicant,* My. P. Rep. 247.

Notice of settlement—of account, sec. 1633.

Absent heirs—attorney for, sec. 1718: distribution of property of, c. 1693 and note.

§ 1666. In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights

§§ 1667-9 PARTITION AND SETTLEMENT.

of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

Decree of final distribution—form of, where unsettled estate of heir or devisee who dies pending administration, My. P. Rep. 252; modifiable below, 36 Cal. 277; when proper, 51 Cal. 568; 52 Cal. 94; nishment after, My. P. Rep. 100; 35 Cal. 392; is charter of distribution, My. P. Rep. 247; recording, sec. 1719; taxes payable before, sec. 1719.

Recover their respective shares—Wheeler v. Bolton, March 1880, 5 Pac. C. L. J. 112.

Appeal—40 Cal. 463; 49 Cal. 551.

Subsequent issue of letters—on discovery of estate, sec. 1698.

§ 1667. Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this State, leaving a will which has been duly proved or allowed in the State of his residence, and an authenticated copy thereof has been admitted to probate in this State, and it is necessary in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this State should be delivered to the executor or administrator in the State or place of his residence, the court may order such delivery to be made, and, if necessary, order a delivery of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator under the will annexed, in this State, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court. [In effect April 16th, 1880.]

Sales of real estate—sec. 1536 et seq.

§ 1668. The order or decree may be made on the application of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication as the court may direct, and for such time as may be ordered. If partition is applied for as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed. [In effect July 1st, 1874.]

Want of notice—decree of distribution void for, 46 Cal. 609.

§ 1669. Before any decree of distribution of an estate is made, the court must be satisfied, by the oath of the executor or administrator, or otherwise, that all State, county, and municipal taxes, legally levied upon persons

erty of the estate, have been fully paid. [In effect April 16th, 1880.]

Similar provision—Political Code, sec. 3752.

Executor paying taxes—entitled to reimbursement, My. P. Rep. 80.

ARTICLE III.

DISTRIBUTION AND PARTITION.

75. Estate in common. Commissioners.
76. Partition and notice thereof, and the time of filing petition.
77. Estate in different counties, how divided.
78. Partition may be made, although some of the heirs, etc., have parted with their interest.
79. Shares to be set out by metes and bounds.
80. Whole estate may be assigned to one, in certain cases.
81. Payments for equality of partition, by whom and how.
82. Estate may be sold.
83. To give notice to all persons and guardians before partition.
Duties of commissioners.
84. To make report, and partition to be recorded.
85. When commissioners to make partition are not necessary.
86. Advancements made to heirs.

1675. When the estate, real or personal, assigned by decree of distribution to two or more heirs, devisees, legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by court, who must be duly sworn to the faithful discharge of their duties, a certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed the same rules as if three were appointed. [In effect April 16th, 1880.]

Attorney appointed by the court—sec. 1718.

1676. Such partition may be ordered and had in the Superior Court on the petition of any person interested. Before commissioners are appointed, or partition ordered by the court as directed in this chapter, notice thereof must be given to all persons interested who reside in this State, or to their guardians, and to the agents, attorneys, or guardians, if any in this State, of such as reside out of this State, either personally or by public notice, as the court may direct. The petition may be filed, and the agents, attorneys, guardians, and agents appointed, and notice

§§ 1677-80 PARTITION AND SETTLEMENT.

given at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate in effect July 16th, 1880.]

§ 1677. If the real estate is in different counties, the court may, if deemed proper, appoint commissioners in all, or different counties for each county. The real estate in each county must be divided separately among the heirs, devisees, or legatees, as if there was no other real estate to be divided; but the commissioners first appointed must, unless otherwise directed by the court, make a division of such real estate wherever situated within the State. [In effect July 16th, 1880.]

§ 1678. Partition or distribution of the real estate may be made as provided in this chapter, although so long as the original heirs, legatees, or devisees, may have received their shares in other persons, and such shares may be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

Person holding the same—extends to assignees of aliens, and to direct distribution to assignee of deceased heir, My. P. Rep.

§ 1679. When both distribution and partition are required, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

§ 1680. When the real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties interested to share therein, who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or set out the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court and recommend that the whole be assigned as herein

led, and must find and report the true value of such estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned. [In effect July 16th, 1880.]

§ 1681. When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make the partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

§ 1682. When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed, in the same manner and under the same requirements provided in article four, chapter seven, of this title.

§ 1683. Before any partition is made of any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, trustees, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

§ 1684. The commissioners must report their proceedings, and the partition agreed upon by them, to the court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the judgment, or de-

§§ 1685-92 PARTITION AND SETTLEMENT.

decree of partition made thereon, attested by the clerk and the seal of the court, must be recorded in the office of the recorder of the county where the lands lie. [In effect July 16th, 1880.]

§ 1685. When the court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made. [In effect July 16th, 1880.]

§ 1686. All questions as to advancements made or alleged to have been made, by the decedent to his children, may be heard and determined by the court, and the decree specified in the decree assigning and distributing the estate; and the final judgment or decree of the court in a case of appeal, of the Supreme Court, is binding on the parties interested in the estate. [In effect July 16th, 1880.]

ARTICLE IV.

AGENTS FOR ABSENT OR INTERESTED PARTIES. DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

- 1691. Court may appoint agent to take possession for absent person.
- 1692. Agent to give bond, and his compensation.
- 1693. Unclaimed estate, how disposed of.
- 1694. When real and personal property of absentee to be sold.
- 1695. Liability of agent on his bond.
- 1696. Certificate to claimant.
- 1697. Final settlement, decree, discharge.
- 1698. Discovery of property.

§ 1691. When any estate is assigned or distributed by a judgment or decree of the court, as provided in this chapter, to any person residing out of, and having no agent in this State, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the distribution.

§ 1692. The agent must execute a bond to the State of California, to be approved by the court, or a judge thereof, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses. [In effect July 16th, 1880.]

1693. When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the State treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the controller, and the other in the court. [In effect July 16th, 1880.]
 paid into the State treasury—but not distributed among the other parties, 6 Cal. 418.

1694. The agent must render the court appointing him, annually, an account, showing:

The value and character of the property received by him, what portion thereof is still on hand, what sold, and what;

The income derived therefrom;

The taxes and assessments imposed thereon, for what, and whether paid or unpaid;

Expenses incurred in the care, protection, and management thereof, and whether paid or unpaid. When called, the court may examine witnesses and take proofs regarding the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, in its order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase-money to be deposited in the State treasury. [In effect July 16th, 1880.]

1695. The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

1696. When any person appears and claims the money paid into the treasury, the court making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of such certificate to him, the controller must draw his warrant on the treasurer for the amount. [In effect July 16th, 1880.]

1697. When the estate has been fully administered, and it is shown by the executor or administrator, by the

production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, in the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment and decree discharging him from all liability to be incurred thereafter.

Paid all sums—of money due to distributees, in contempt of court, 53 Cal. 204.

Delivered property of estate—to distributees, Wheeler v. Wheeler, 13th, 1880, 5 Pac. C. L. J. 112.

Discharge of executor, etc.—allowance of final account is not binding, Cal. 146: afterward, no longer represents the estate, 24 Cal. 491.

Discharge of guardian—36 Cal. 651.

§ 1698. The final settlement of an estate, as provided in this chapter, shall not prevent a subsequent issue of letters testamentary, or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or expedient for any cause that letters should be again issued. [Effect July 1st, 1874.]

CHAPTER XII.

**OF ORDERS, DECREES, PROCESS, MINUTES,
RECORDS, TRIALS, AND APPEALS.**

1704. Orders and decrees to be entered in minutes.
 1705. How often publication to be made.
 1706. Recorded decree or order to impart notice from date of filing.
 1707. Citation, how directed and what to contain.
 1708. Citation, how issued.
 1709. Citation, how served.
 1710. Personal notice given by citation.
 1711. Citation to be served five days before return.
 1712. One description of real estate sought to be sold being published, is sufficient for all purposes.
 1713. Rules of practice generally.
 1714. New trials and appeals.
 1715. Within what time appeal must be taken.
 1716. Issues joined in Probate Court, how tried and disposed of.
 1717. Court to try case when no jury is demanded. How and what issues to be tried.
 1718. Court to appoint attorney for minor or absent heirs, devisees, legatees, or creditors, when, and what compensation he is to receive.
 1719. Decree relative to homestead, and effect thereof.
 1720. Costs, by whom paid in certain cases.
 1721. Executor, etc., to be removed when committed for contempt.
 1722. Service upon guardian.
 1723. Termination of life estate.

§ 1704. Orders and decrees made by the court, or a judge thereof, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute book of the court. [In effect July 16th, 1880.]

Interpretation of section—51 Cal. 146.

§ 1705. When any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court, or a judge hereof, may, however, order a less number of publications during the period. [In effect July 16th, 1880.]

Affidavit of publication—secs. 2010, 2011.

Order directing publication—particularity of, 51 Cal. 146.

CODE CIV. PROC.—46.

§ 1706. When it is provided in this title that any order or decree of the court, or a judge thereof, or a writ thereof, must be recorded in the office of the clerk or recorder, from the time of filing the same for which notice is imparted to all persons of the contents thereof. [In effect July 16th, 1880.]

§ 1707. Citations must be directed to the person cited, signed by the clerk and issued under the seal of the court, and must contain—

1. The title of the proceeding;
2. A brief statement of the nature of the proceeding;
3. A direction that the person cited appear at a certain time and place specified.

§ 1708. The citation may be issued by the clerk or judge, at the application of any party without an order of the court or judge, except in cases in which such order is by the provisions of this title expressly required.

§ 1709. The citation must be served in the same manner as a summons in a civil action.

Service of citation—time for, sec. 1711; same manner as summons in a civil action, see sec. 410 *et seq.*

§ 1710. When personal notice is required, and no other mode of giving it is prescribed in this title, it must be given in person at the residence of the person cited.

§ 1711. When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof.

§ 1712. When a complete description of the real estate of an estate sought to be sold has been given in a newspaper, as required in the order of sale, and the cause why the sale should not be made, such description need not be published in any subsequent notice of sale or notice of a petition for the confirmation thereof; it is sufficient to refer to the description contained in the first notice, as being proved and on record in the court.

§ 1713. Except as otherwise provided in this title, the provisions of part two of this Code are applicable to citations, and constitute the rules of practice in the proceedings mentioned in this title.

§ 1714. The provisions of part two of this Code, relating to new trials and appeals—except in so far as they

inconsistent with the provisions of this title—apply to the proceedings mentioned in this title.

§ 1715. The appeal must be taken within sixty days after the order, decree, or judgment is entered.

Appeals from Superior Courts—in probate matters, sec. 963, subd. 3.

Within sixty days—Estate of Burns, Feb. 28th, 1880, 5 Pac. C. L. J. 49.

Parties aggrieved—may appeal, 40 Cal. 463.

§ 1716. All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article two, chapter two, of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court, as in civil actions. [In effect July 16th, 1880.]

Trial of issues—see sec. 1717.

Judgment—sec. 664n.

Execution—sec. 684n.

§ 1717. If no jury is demanded, the court must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial, upon the same grounds and errors, and in like manner, as provided in this Code for civil actions.

New trials—see sec. 1714.

§ 1718. At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmations thereof; settlements, partitions, and distributions of estates, setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof; the court may, in its discretion, appoint some competent attorney-at-law to represent in all such proceedings the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the State; and those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties so far as known for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceed-

ings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court, for his services, which must be paid out of the funds of the estate, necessary expenses of administration, and upon condition may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the court may substitute another attorney for the one appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings. [In effect July 16th, 1880.]

Attorney for absent heirs—fees of, 36 Cal. 278; 43 Cal. 543; waiver of minor's rights, My. P. Rep. 6; cannot institute proceedings for revocation of probate, My. P. Rep. 75.

§ 1719. When a judgment or decree is made, confirming a sale, or apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the recorder of the county in which the property is situated. [In effect July 1st, 1874.]

§ 1720. When it is not otherwise prescribed by law, the title, the Superior Court, or the Supreme Court, on appeal, may, in its discretion, order costs to be paid by the party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may be issued out of the Superior Court. [In effect July 16th, 1880.]

Costs against executor—or administrator, sec. 1509.

Costs—when paid out of the estate, 47 Cal. 450; on contest before Code, 19 Cal. 388; on appeal, Estate of Barton, June 16th, 1880. Pac. C. L. J. 511.

§ 1721. Whenever an executor, administrator, or guardian is committed for contempt in disobeying any order of the court, or a judge thereof, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the court may, by order reciting the facts, and without further notice, show or notice, revoke his letters and appoint another person entitled thereto executor, administrator, or guardian in his stead. [In effect July 16th, 1880.]

Imprisonment of executor—for not paying over the disbursements of the estate, My. P. Rep. 160; and see 53 Cal. 204.

§ 1722. Whenever an infant, insane, or incompetent person has a guardian of his estate residing in this state, the court may, upon personal service upon the guardian of any process, or order of the court concerning the estate of a de-

person in which the ward is interested, is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do. [In effect July 16th, 1880.]

§ 1723. If any person has died, or shall hereafter die, who at the time of his death was the owner of a life estate, which terminates by reason of the death of such person, any person interested in the property, or in the title hereto, in which such life estate was held, may file in the Superior Court of the county in which the property is situated, his verified petition, setting forth such facts, and thereupon, and after such notice, by publication or otherwise, as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if, upon such hearing, it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and hereafter shall have the same effect as a final decree of distribution so recorded. [In effect March 4th, 1881.]

CHAPTER XIII. OF PUBLIC ADMINISTRATOR

- § 1726. What estates to be administered by public administrator.
- § 1727. Public administrator to obtain letters, when and how bond and oath.
- § 1728. Duty of persons in whose house any stranger dies.
- § 1729. Must return inventory and administer estates according title.
- § 1730. When another person is appointed administrator or ex public administrator to deliver up the estate.
- § 1731. Civil officers to give notice of waste to public administrator.
- § 1732. Suits for property of decedents.
- § 1733. Order to examine party charged with embezzling estate.
- § 1734. Punishment for refusing to attend.
- § 1735. Order on public administrator to account.
- § 1736. Every six months to make and publish return of condition of estate.
- § 1737. When there are no heirs or claimants, moneys and effects to county treasurer, etc.
- § 1738. Not to be interested in the payments for or on accounts in his hands.
- § 1739. When to settle with county clerk, and how unclaimed property disposed of.
- § 1740. Proceedings, how and by whom instituted, against public administrator failing to pay over money as ordered.
- § 1741. Fees of officers, when and by whom paid.
- § 1742. Public administrator to administer oaths.
- § 1743. Preceding chapters applicable to public administrator.

§ 1726. Every public administrator, duly elected and commissioned, and qualified, must take charge of the estates of persons dying within his county as follows:

1. Of the estate of decedents for which no administrator are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost;
2. Of the estates of decedents who have no known heirs;
3. Of the estates ordered into his hands by the court;
4. Of the estates upon which letters of administration have been issued to him by the court. [In effect 16th, 1880.]

§ 1727. Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on the same proceedings as letters of administration are issued.

other persons. His official bond and oath are in lieu of the administrator's bond and oath, but when real estate is ordered to be sold, another bond may be required by the court.

Letters of administration—need of granting, to public administrator, 7 Cal. 215; 11 Cal. 120; 17 Cal. 233; 34 Cal. 464; continue in force after office expires, 11 Cal. 120; 53 Cal. 259; but estate must be delivered to another appointee, secs. 1730, 1735.

Bond on sale of real estate—sec. 1389.

Bondsman of public administrator—liable after term expires, 53 Cal. 259.

§ 1728. Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested.

§ 1729. The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same according to the provisions of this title, subject to the control and directions of the court. [In effect July 16th, 1880.]

Failure to file inventory, etc.—ground for revocation of letters, My. P. Rep. 251.

§ 1730. If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession or under his control. [In effect July 16th, 1880.]

Authority of public administrator—continues after term until new appointment, 11 Cal. 120.

§ 1731. All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought to be in possession of the public administrator.

§ 1732. The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.

§ 1733. When the public administrator complains to the Superior Court, or a judge thereof, on oath, that a person has concealed, embezzled, or disposed of, or has in his possession any money, goods, property, or effects of the possession of which such administrator is entitled in his official capacity, the court or judge may cite such person to appear before the court, and may examine him on oath, touching the matter of such complaint. [In effect July 16th, 1880.]

Citation—secs. 1707-1711.

§ 1734. All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the court. If the person so cited refuses to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may commit him to the county jail, there to remain, in close custody, until he submits to the order of the court. [In effect July 16th, 1880.]

Contempt—secs. 1209, 1219.

§ 1735. The court may, at any time, order the public administrator to account for and deliver all the moneys and property of an estate in his hands to the heirs, executors or administrators regularly appointed. [In effect July 16th, 1880.]

§ 1736. The public administrator must, once in every six months, make to the Superior Court, under oath, a return of all estates of decedents which have come into his hands, the value of the same, the money which he has done with it, and the amount of his fees and expenses incurred, and the balance, if any, remaining in his hands. He must publish the same six times in some newspaper published in the county, or if there is none, then post the same publicly written or printed, in the office of the county clerk of the county. [In effect July 16th, 1880.]

Semi-annual statement—of affairs of estate, etc., neglect and revocation of letters, My. P. Rep. 251.

Publication—sec. 1705.

§ 1737. It is the duty of every public administrator, as soon as he shall receive the same, to deposit with the county treasurer of the county in which the probate proceedings are pending, all moneys of the estate not required for the current expenses of the administration; and no moneys may be drawn upon the order of the executor

administrator, countersigned by a superior judge, when required for the purposes of administration. It shall be the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the executor or administrator, when countersigned by a superior judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and the county treasurer shall be allowed one per cent. upon all moneys received and kept by him, and no greater fees for any services herein provided; and for the safe keeping and payment of all such moneys, as herein provided, the said treasurer and his sureties shall be responsible upon his official bond. The moneys thus deposited may, upon order of the court, be invested, pending the proceedings, in securities of the United States, or of this State, when such investment is deemed by the court to be for the best interests of the estate. After a final settlement of the affairs of any estate, if there be no heirs, or other claimants thereof, the county treasurer shall pay into the State treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and if any such moneys and effects escheat to the State, they must be disposed of as other escheated estates. [In effect July 16th, 1880.]

Depositing money in county treasury, etc.—failure causes revocation of letters, My. P. Rep. 251.

Escheated estates—secs. 1269-1272.

§ 1738. The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers, nor must he be associated in business or otherwise with any one who is so interested, and he must attach to his report and publication, made in accordance with the preceding section, his affidavit to that effect.

§ 1739. Public administrators are required to account under oath, and to settle and adjust their accounts relating to the care and disbursement of money or property belonging to estates in their hands, with the county clerks of their respective counties, on the first Monday in each month; and they must pay to the county treasurer any money remaining in their hands of an estate unclaimed, as provided in sections sixteen hundred and ninety-three to sixteen hundred and ninety-six, both inclusive.

§ 1740. When it appears, from the returns made in pursuance of the foregoing sections, that any money re-

mains in the hands of the public administrator (a final settlement of the estate) unclaimed, which should be paid over to the county treasurer, the Superior Court judge thereof, must order the same to be paid over to the county treasurer; and on failure of the public administrator to comply with the order within ten days after the same is made, the district attorney for the county must immediately institute the requisite legal proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of the money so withheld, and costs. [In effect July 16th,

§ 1741. The fees of all officers chargeable to estates in the hands of public administrators, must be paid out of the assets thereof so soon as the same come into his hands.

§ 1742. Public administrators may administer estates in regard to all matters touching the discharge of their duties, or the administration of estates in their hands.

Administration of oaths—sec. 2093 *et seq.*

§ 1743. When no direction is given in this chapter by the government or guidance of a public administrator in the discharge of his duties, or for the administration of estates in his hands, the provisions of the preceding chapters of this title must govern.

**CHAPTER XIV.
OF GUARDIAN AND WARD.**

- ART. I. GUARDIANS OF MINORS.**
II. GUARDIANS OF INSANE AND INCOMPETENT PERSONS.
III. THE POWERS AND DUTIES OF GUARDIANS.
IV. THE SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.
V. NON-RESIDENT GUARDIANS AND WARDS.
VI. GENERAL AND MISCELLANEOUS PROVISIONS.

ARTICLE I.

GUARDIANS OF MINORS.

1747. Judge to appoint guardians, when, and on what petition.
 1748. When minor may nominate guardian; when not.
 1749. When appointment may be made by judge, when minor is over fourteen.
 1750. Nomination by minors after arriving at fourteen.
 1751. Father or mother entitled to guardianship.
 1752. Minor having no father or mother.
 1753. Powers and duties of guardian.
 1754. Bond of guardian, conditions of.
 1755. Probate judge may insert conditions in order appointing guardian.
 1756. Letters of guardianship and bond of guardian to be recorded.
 1757. Maintenance of minor out of income of his own property.
 1758. Guardian to give bond. Powers limited.
 1759. Power of courts to appoint guardians and next friend not impaired.

§ 1747. The Superior Court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the State and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper. [In effect April 15th, 1880.]

Powers and duties of guardians—sec. 1768 *et seq.*

Guardian and ward—see Civil Code, secs. 236-258.

Guardian ad litem—see sec. 1759.

Guardian of minor—minors generally, see Civil Code, secs. 204; control of District Courts over minors, before amdts. 18362; on petition of minor, see sec. 1748; administrator also, 33 Cal. 482; legislative appointment of, when unconstitutional, 33 Cal. 482.

Letters of guardianship—when need not actually issue, 15 Cal. 629.

Non-resident minor—notice of application for guardianship, 15 Cal. 629.

§ 1748. If the minor is under the age of fourteen years, the court may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly. [In effect April 15th, 1880.]

§ 1749. If the guardian nominated by the minor is not approved by the court, or if the minor resides out of State, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years. [In effect April 15th, 1880.]

§ 1750. When a guardian has been appointed for a minor under the age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the court. [In effect April 15th, 1880.]

§ 1751. The father of the minor, if living, and in the event of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business and not otherwise unsuitable, must be appointed guardian of the minor.

Control of parent—see Civil Code, secs. 202, 213; 37 Cal. 657; when preferred to father, My. P. Rep. 18; contest between father and stranger, My. P. Rep. 215.

§ 1752. If the minor has no father or mother, the court competent to have the custody and care of his education, the guardian appointed shall have the same.

Where parent living—otherwise, 37 Cal. 657.

§ 1753. Every guardian appointed shall have the custody and care of the education of the minor, and the management of his estate, until such minor reaches the age of majority or marries, or until the guardian is legally discharged.

§ 1754. Before the order appointing any person as guardian under this chapter takes effect, and before the court issues the letters of guardianship, the court must require of such person a bond with sufficient sureties, to be approved by the court.

age, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court may order;

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward;

3. To render an account on oath of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of administration, and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law. [In effect April 15th, 1880.]

SUBDIVISION 3. Accounts of guardians—exclusive jurisdiction of Probate Court over, before amds. 1880, 53 Cal. 16: rendering, secs. 1773, 1774.

§ 1755. When any person is appointed guardian of a minor, the court may, with the consent of such person, insert in the order of appointment, conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor. The performance of such conditions shall be a part of the duties of the guardian, and the faithful performance of which he and the sureties on his bond shall be responsible. [In effect April 15th, 1880.]

Undertakings generally—sec. 941n.

Guardian's bond—liability on, sec. 1407.

Letters of guardianship—special, issuable at chambers, sec. 166.

§ 1756. All letters of guardianship issued, and all guardians' bonds executed under the provisions of this

chapter, with the affidavits and certificates thereon to be recorded by the clerk of the court having jurisdiction of the persons and estates of the wards. [In effect April 15th, 1880.]

§ 1757. If any minor having a father living having sufficient property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judgment shall be reasonable, and must be directed by the court; and all charges therefor may be allowed accordingly in the settlement of the accounts of his guardian. [In effect April 15th, 1880.]

§ 1758. Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except insofar as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed. [In effect April 15th, 1880.]

Testamentary guardian—when not entitled to custody and bond of minor, 37 Cal. 657: bond of, see sec. 1754: need not have bond, 15 Cal. 227.

§ 1759. Nothing contained in this chapter affects the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

Guardian ad litem—secs. 372, 373, 1722, 1763; 19 Cal. 629; 15 Cal. 484.

ARTICLE II.

GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

- § 1763. Guardians of insane and other incompetent persons.
- § 1764. Appointment by probate judge after hearing.
- § 1765. Powers and duties of such guardians.
- § 1766. Petition for restoration to capacity.

§ 1763. When it is represented to the Superior Court or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause is mentally incompetent to manage his property, such judge or judge must cause a notice to be given to the superior court of the insane or incompetent person of the time and place for hearing the case, not less than five days before the

so appointed; and such person, if able to attend, must be produced on the hearing. [In effect April 15th, 1880.]

Insane person—placed in asylum, Civil Code, sec. 258: homestead of, see Stats. 1874, p. 582.

Guardian ad litem—of insane or incompetent person, secs. 372, 373, 1722.

Letters of guardianship—of lunatic, not collaterally attackable, 4 Cal. 310: application for, should be made in county where incompetent person resides, My. P. Rep. 97.

§ 1764. If, after a full hearing and examination upon such petition, it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified. [In effect April 15th, 1880.]

Party appointed guardian—45 Cal. 176; 49 Cal. 590; My. P. Rep. 10.

§ 1765. Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

Discharge of guardian—generally, 36 Cal. 651.

Bond of guardian—sec. 1754.

§ 1766. Any person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the Superior Court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane or competent. Upon receiving the petition, the court must appoint a day for a hearing before the court, and, if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil

cases, and may be called and examined by the court on its own motion. If it be found that the person has a sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardian of such person, if such person is a minor, shall cease. [In effect April 15th, 1880.]

ARTICLE III.

THE POWERS AND DUTIES OF GUARDIANS.

- 1768. Guardian to pay debts of ward out of ward's estate.
- 1769. Guardian to recover debts due his ward and represent ward.
- 1770. Guardian to manage his estate, maintain ward, and educate ward.
- 1771. Maintenance, support, and education of ward, how estimated.
- 1772. May assent to a partition of real estate.
- 1773. Guardian to return inventory of estate of ward. Appointment to be appointed. Like proceedings when other guardian acquired.
- 1774. Settlements of guardians.
- 1775. Allowance of accounts of joint guardians.
- 1776. Expenses and compensation of guardians.

§ 1768. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate, and the income of his real estate, sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the proceeds in the manner provided in this title for the sale of the estate of decedents.

Payment of debts—36 Cal. 651.

Order for sale of property—sec. 1770: legislative authority, 50 Cal. 153; 51 Cal. 352; requisite for personal estate, 52; 42 Cal. 290.

Order directing payment—to guardian of infant heirs, effect, 343.

§ 1769. Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court, receive for the same and give discharges to the debtors, and he must appear for and represent his ward in all suits and proceedings, unless another person be appointed for that purpose. [In effect April 15th, 1880.]

Sue for ward—20 Cal. 659; not in his own name, 32 Cal. 111.

Appear for ward—19 Cal. 632; 42 Cal. 484.

§ 1770. Every guardian must manage the estate of the ward frugally and without waste, and apply the income

and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

Manage the estate—liable for not taking security, My. P. Rep. 230. may employ agent, 36 Cal. 651: must be appointed, 9 Cal. 531.

Sale of property—and disposition of proceeds, sec. 1777 *et seq.*

§ 1771. When a guardian has advanced for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable or necessary maintenance, support, or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

Before this section enacted—Held that court had no such powers as to reimbursement, 40 Cal. 456.

Waiver of reimbursement—by guardian, My. P. Rep. 69.

§ 1772. The guardian may join in and assent to a partition of the real estate of the ward, wherever such assent may be given by any person.

Assent to partition—sec. 795: provision inapplicable, 19 Cal. 217: appearance by guardian, secs. 372, 1722.

§ 1773. Every guardian must return to the court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the court. The court may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. The inventories and accounts so to be returned or

rendered must be sworn to by the guardian. All state of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acted in the manner provided for regulating the settlement of estates of decedents. Such inventory, with the appraisement of the property therein described, must be returned by the clerk of the court in a proper book kept in the office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and when any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof in conformity with the provisions herein provided in relation to the first inventory and return. [In effect April 15th, 1880.]

Accounts sworn to by guardian—when by another, 36 Cal. Rep. 225: where joint guardians, sec. 1775.

Appraisers—generally, sec. 1444.

§ 1774. The guardian must, upon the expiration of one year from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance. [In effect April 15th, 1880.]

Accounts of guardian—sec. 1773: presentation for allowance and settlement, contest on, 36 Cal. 653: must cover foreign funds, 36 Cal. Rep. 225: liability for loan without security, My. P. Rep. 230.

§ 1775. When an account is rendered by two or more joint guardians, the court may, in its discretion, allow the same upon the oath of any of them. [In effect April 15th, 1880.]

§ 1776. Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled may deem just and reasonable.

Expenses incurred—advances made, sec. 1771.

ARTICLE IV.

THE SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS OF SALES.

- 1777. May sell property in certain cases.
- 1778. Sale of real estate to be made upon order of court.
- 1779. Application of proceeds of sales.
- 1780. Investment of proceeds of sales.
- 1781. Order for sale, how obtained.
- 1782. Notice to next of kin, how given.
- 1783. Copy of order to be served, published, or consent filed.

- § 1784. Hearing of application.
- § 1785. Who may be examined on such hearing.
- § 1786. Costs to be awarded, to whom.
- § 1787. Order of sale, to specify what.
- § 1788. Bond before selling.
- § 1789. All proceedings for sales of property by guardians to conform to chapter seven of this title.
- § 1790. Limit of order of sale.
- § 1791. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.
- § 1792. Court may order the investment of money of the ward.

§ 1777. When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

Power of guardian—to sell property, sec. 1768 and notes.

§ 1778. When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

Petition of the guardian—requisites of, 20 Cal. 352.

Order for sale of property—sec. 1768n.

• § 1779. If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

§ 1780. If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court. [In effect April 15th, 1880.]

§ 1781. To obtain an order for such sale, the guardian must present to the court in which he was appointed guardian a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and cir-

circumstances on which the petition is founded, tend to show the necessity or expediency of a sale. [In effect April 15th, 1880.]

Requisites of petition—20 Cal. 382.

§ 1782. If it appear to the court, or a judge thereof, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part thereof, should be sold, or that the real and personal estate should be sold, the court must thereupon make an order requiring the next of kin of the ward, and all persons interested in the estate, to appear before the court, at the time and place therein specified; not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary and would be beneficial to the ward to sell the personal estate, or some part of it, the court must order the sale to be made. [In effect April 15th, 1880.]

§ 1783. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the making of the petition, or must be published at least once a week for three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court in the order. If written consent to making the order for sale is subscribed by all persons interested therein, the next of kin, notice need not be served or published. [In effect April 15th, 1880.]

Notice—compare sec. 1539 and 46 Cal. 635.

§ 1784. The court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of the next of kin, and of all persons interested in the estate who oppose the application. [In effect April 15th, 1880.]

Compare—sec. 1540.

§ 1785. On the hearing, the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel attendance and testimony may be issued by the court in the same manner and with like effect as in other proceedings provided for in this title. [In effect April 15th, 1880.]

Compelling attendance and testimony of witnesses—sec. 1541.

§ 1786. If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appear to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof.

§ 1787. If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof, should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

§ 1788. Every guardian authorized to sell real estate must, before the sale, give bond to the ward, with sufficient surety, to be approved by the court, or a judge thereof, with condition to sell the same in the manner, and to account for the proceeds of the sale as provided for in this chapter, and chapter seven of this title. [In effect April 15th, 1880.]

Bond on sale of realty—sec. 1389.

§ 1789. All the proceedings under petition of guardians for sales of property of their wards, giving notice, and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale, and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter.

Settlement of accounts—of guardian of infant after letters revoked, sec. 1629; 52 Cal. 636.

§ 1790. No order of sale, granted in pursuance of this article, continues in force more than one year after granting the same, without a sale being had.

§ 1791. All sales of real estate of wards must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as in the discretion of the court is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes, and a mortgage on the real estate sold,

with such additional security as the court deems sary and sufficient to secure the prompt payment amounts so deferred, and the interest thereon. [In April 15th, 1880.]

§ 1792. The court, on the application of a guard any person interested in the estate of any ward such notice to persons interested therein as the cour direct, may authorize and require the guardian to the proceeds of sales, and any other of his ward's in his hands, in real estate, or in any other manne to the interest of all concerned therein, and the cou make such other orders and give such directions needful for the management, investment, and dispo of the estate and effects, as circumstances requir effect April 15th, 1880.]

ARTICLE V.

NON-RESIDENT GUARDIANS AND WARDS.

- § 1793. Guardians of non-resident persons.
- § 1794. Powers and duties of guardians appointed under pr section.
- § 1795. Such guardians to give bonds.
- § 1796. To what guardianship shall extend.
- § 1797. Removal of non-resident ward's property.
- § 1798. Proceedings on such removal.
- § 1799. Discharge of person in possession.

§ 1793. When a person liable to be put under ianship, according to the provisions of this chap sides without this State and has estate therein, any of such person, or any one interested in his estate, pectancy or otherwise, may apply to the Superior of any county in which there is any estate of such a person, for the appointment of a guardian, and if notice given to all interested, in such manner as court orders by publication or otherwise, and a full ing and examination, it appears proper, a guardi such absent person may be appointed. [In effect 15th, 1880.]

Notices, insufficient—appointment not attackable by third for, 19 Cal. 629.

Foreign guardian—sec. 1913.

§ 1794. Every guardian, appointed under the p ing section, has the same powers and performs the duties, with respect to the estate of the ward within this State, and with respect to the person ward, if he shall come to reside therein, as are pres

with respect to any other guardian appointed under this chapter.

§ 1795. Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this State.

Bond, inventory, account, etc.—sec. 1754.

§ 1796. The guardianship which is first lawfully granted of any person residing without this State extends to all the estate of the ward within this State, and excludes the jurisdiction of the court of every other county. [In effect April 15th, 1880.]

§ 1797. When the guardian and ward are both non-residents, and the ward is entitled to property in this State, which may be removed to another State or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the State or foreign country of the residence of the ward, upon the application of the guardian to the Superior Court of the county in which the estate of the ward, or the principal part thereof, is situated. [In effect April 15th, 1880.]

§ 1798. The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, and upon such application the non-resident guardian must produce and file a certificate, under the hand of the clerk and seal of the court, from which his appointment was derived, showing:

1. A transcript of the record of his appointment;
2. That he has entered upon the discharge of his duties;
3. That he is entitled, by the laws of the State of his appointment, to the possession of the estate of the ward; or, must produce and file a certificate, under the hand and seal of the clerk of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul, or vice-consul of the United States, resident in such country, that, by the laws of such country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court. Upon such application, unless good cause to the contrary is shown, the court must make an order grant-

§§ 1799-1801 GUARDIAN AND WARD.

ing to such guardian leave to take and remove the property of his ward to the State or place of his residence which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward. [In effect April 15th, 1880.]

§ 1799. Such order is a discharge of the executor, administrator, local guardian, or other person in whose session the property may be at the time the order is made. On filing with the court the receipt therefor of the guardian of such absent ward. [In effect April 15th, 1880.]

ARTICLE VI.

GENERAL AND MISCELLANEOUS PROVISIONS.

- § 1800. Examination of persons suspected of defrauding or concealing property.
1801. Removal and resignation of guardian, and surrender of bond.
1802. Guardianship, how terminated.
1803. New bond, when required.
1804. Guardian's bond to be filed. Action on.
1805. Limitation of actions on guardian's bond.
1806. Limitation of actions for the recovery of property sold.
1807. More than one guardian of a person may be appointed.
1808. Power of probate judge in chambers.
1809. Provisions of section ten hundred and fifty-seven apply to guardians.

§ 1800. Upon complaint made to him by any guardian, creditor, or other person interested in the estate of a ward having a prospective interest therein as heir or otherwise against any one suspected of having concealed, defrauded, or conveyed away any of the money, goods, or effects, or an instrument in writing belonging to the ward, or to his estate, the Superior Court, or a judge thereof, may cite such suspected person to appear before the court, and may examine and proceed with him as in and to the charge in the manner provided in this title with respect to persons suspected of and charged with concealing or bezzling the effects of a decedent. [In effect April 15th, 1880.]

Embezzlement—of property of estate, sec. 1458 *et seq.*

§ 1801. When a guardian, appointed either by the testator or a court, becomes insane or otherwise incompetent of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the Superior Court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawful guardian.

led thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court may appoint another in the place of the guardian who resigned or was removed. [In effect April 15th, 1880.]

Removal of guardian—at chambers, 38 Cal. 442: when proper, 47 Cal. 29.

§ 1802. The marriage of a minor ward terminates the guardianship of the person of such ward, but not the estate; and the guardian of an insane or other person may be discharged by the court, when it appears, on the application of the ward or otherwise, that the guardianship is no longer necessary. [In effect April 15th, 1880.]

§ 1803. The court may require a new bond to be given by a guardian whenever such court deems it necessary, and may discharge the existing sureties from further liability, after due notice given as such court may direct, when it shall appear that no injury can result therefrom to those interested in the estate. [In effect April 15th, 1880.]

§ 1804. Every bond given by a guardian must be filed and preserved in the office of the clerk of the Superior Court of the county, and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate. [In effect April 15th, 1880.]

Suit on bond—party beneficially interested, sec. 367 and notes; 32 Cal. 111.

§ 1805. No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

Person under legal disability—extension for, 36 Cal. 651.

§ 1806. No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or, when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

§ 1807. The court, in its discretion, whenever necessary, may appoint more than one guardian of any subject to guardianship, who must give bond and be bound and liable in all respects as a sole guardian.

§ 1808. Any order appointing a guardian, when entered as and become a decree of the court. The provisions of this title relative to the estates of decedents far as they relate to the practice in the Superior Court apply to proceedings under this chapter. [In effect 15th, 1880.]

§ 1809. The provisions of section ten hundred and fifty-seven are hereby declared to apply to guardians appointed by the court, and to the bonds taken of such guardians, and to the sureties on such bonds.

STANDARD LAW LIBRARY

**TITLE XII.
OF SOLE TRADERS.**

1811. Who may become sole traders.
 1812. Notice, how given and what to contain.
 1813. Petition, what to contain when filed.
 1814. May have five hundred dollars of community or husband's property.
 1815. Who may oppose it, and how.
 1816. Trial or hearing.
 1817. Decree, what it must be.
 1818. Oath, copy of order to be recorded.
 1819. Rights and liabilities of sole traders.
 1820. Sole trader must maintain her children.
 1821. Husband of sole trader not liable for debts.

§ 1811. A married woman may become a sole trader by the judgment of the Superior Court of the county in which she has resided for six months next preceding the application. [In effect Feb. 26th, 1881.]

Sole trader law—strict construction, 22 Cal. 233.

County Court—see SUPERSEDED COURTS, sec. 76n.

§ 1812. A person intending to make application to become a sole trader must publish notice of such intention in a newspaper published in the county, or, if none, then in a newspaper published in an adjoining county, once a week for four successive weeks. The notice must specify the day upon which application will be made, the nature and place of the business proposed to be conducted by her, and the name of her husband. [In effect Feb. 26th, 1881.]

Four successive weeks—23 Cal. 388

Term—abolition of terms, sec. 73n.

§ 1813. Ten days prior to the day named in the notice, the applicant must file a verified petition setting forth:

1. That the application is made in good faith, to enable the applicant to support herself, or herself and others dependent upon her, giving their names and relation;
2. The fact of insufficient support from her husband, and the causes thereof, if known;
3. Any other grounds of application which are good causes for a divorce, with the reason why a divorce is not sought; and
4. The nature of the business proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived.

§ 1814. The applicant may invest in the business proposed to be conducted, a sum derived from the community property or of the separate property of the husband exceeding five hundred dollars.

§ 1815. Any creditor of the husband may oppose application, by filing in the court (prior to the day named in the notice) a written opposition verified, containing either:

1. A specific denial of the truth of any material allegation of the petition; or setting forth,
2. That the application is made for the purpose of defrauding the opponent; or
3. That the application is made to prevent, or to prevent him from collecting his debt.

SUBDIVISION 2. Defrauding the opponent—25 Cal. 225: and Cal. 105.

§ 1816. On the day named in the notice, or on any other day to which the hearing may be postponed in court, the applicant must make proof of publication of the notice hereinbefore required, and the issues, if any, must be tried as in other cases; if no issues are joined, the court must hear the proofs of the applicant and find the facts in accordance therewith.

§ 1817. If the facts found sustain the petition, the court must render judgment authorizing the applicant to carry on in her own name and on her own account the business specified in the notice and petition.

§ 1818. The sole trader must make and file with the clerk of the court an affidavit, in the following form:
I, A. B., do, in the presence of Almighty God, solemnly swear that this application was made in good faith for the purpose of enabling me to support myself, (and my dependent, such as husband, parent, sister, child, or other like, naming them, if any) and not with any view to defraud, delay, or hinder any creditor or creditors of my husband; and that of the moneys so to be used by me in this business, not more than five hundred dollars have been derived either directly or indirectly from my husband. So help me God.

A certified copy of the decree, with this oath thereon, must be recorded in the office of the recorder of the county where the business is to be carried on, and a copy thereof must be kept for such purpose.

Decree and oath—of sole trader, though informal, admitted—Cal. 197.

§ 1819. When the judgment is made and entered, and a copy thereof, with the affidavit provided for in section one thousand eight hundred and eighteen, duly recorded, the person therein named is entitled to carry on the business specified, in her own name, and the property, revenues, money, and credits so by her invested, and the profits thereof, belong exclusively to her, and are not liable for any debts of her husband, and she, thereafter, has all the privileges of, and is liable to all legal processes provided for debtors and creditors, and may sue and be sued alone without being joined with her husband; provided, however, that she shall not be at liberty to carry on said business in any other county than that named in the notice provided for in section one thousand eight hundred and twelve, until she has recorded in such other county a copy of said judgment and affidavit. [In effect March 16th, 1876.]

Carry on the business specified—husband's connection, 7 Cal. 456; 9 Cal. 564.

Sue and be sued alone—sec. 370; 6 Cal. 497; 17 Cal. 119; 22 Cal. 522; 31 Cal. 104; 39 Cal. 287.

§ 1820. A married woman who is adjudged a sole trader is responsible and liable for the maintenance of her minor children.

§ 1821. The husband of a sole trader is not liable for any debts contracted by her in the course of her sole trader's business, unless contracted upon his written consent.

TITLE XIII

OF PROCEEDINGS IN INSOLVENCY.

§ 1822. Statutes in relation to, continued in force.

§ 1822. Nothing in this Code affects any of the provisions of "an act for the relief of insolvent debtors and protection of creditors," approved May 4th, 1852, or of the acts amendatory thereof, approved respectively March 2th, 1858, April 27th, 1860, and April 27th, 1863; but such acts are recognized as continuing in force notwithstanding the provisions of this Code.

Insolvent Act of 1880—Stats. 1880, p. 316.

Insolvency decisions—2 Cal. 107; 3 Cal. 47; 5 Cal. 195; 6 Cal. 287, 600; 7 Cal. 89, 428; 8 Cal. 44; 9 Cal. 45, 162; 10 Cal. 41, 269, 418, 483; 14 Cal. 47, 173, 450; 17 Cal. 518; 19 Cal. 691; 22 Cal. 38; 29 Cal. 415; 31 Cal. 167, 201, 283; 32 Cal. 406; 33 Cal. 530; 34 Cal. 24, 92, 391; 36 Cal. 24; 37 Cal. 209; 39 Cal. 137; 40 Cal. 422; 41 Cal. 123, 566; 48 Cal. 201; *Bandy v. Ransome*, Jan. 18th, 1880, 4 Pac. C. L. J. 537; *Cal. F. Co. v. Halsey*, March 15th, 1880, 5 Pac. C. L. J. 125; *Wilson v. His Creditors*, July 6th, 1880, 5 Pac. C. L. J. 32; *Boedfield v. Read*, July 20th, 1880; *Creditors v. Huston*, July 21st, 1880.

PART IV.
OF EVIDENCE.

- GENERAL DEFINITIONS. §§ 1823-1839.
TITLE I. OF GENERAL PRINCIPLES. §§ 1844-1870.
II. KINDS AND DEGREES OF EVIDENCE. §§ 18
III. PRODUCTION OF EVIDENCE. §§ 1981-205
IV. EFFECT OF EVIDENCE. § 2061.
V. RIGHTS AND DUTIES OF WITNESSES. §§ 20
VI. EVIDENCE IN PARTICULAR CASES, AND G
PROVISIONS. §§ 2074-2103.

OF EVIDENCE.

GENERAL DEFINITIONS AND DIVISIONS.

- § 1823. Definition of evidence.
- 1824. Definition of proof.
- 1825. Definition of law of evidence.
- 1826. The degree of certainty required to establish facts.
- 1827. Four kinds of evidence specified.
- 1828. Several degrees of evidence specified.
- 1829. Original evidence defined.
- 1830. Secondary evidence defined.
- 1831. Direct evidence defined.
- 1832. Indirect evidence defined.
- 1833. Primary evidence defined.
- 1834. Partial evidence defined.
- 1835. Satisfactory evidence defined.
- 1836. Indispensable evidence defined.
- 1837. Conclusive evidence defined.
- 1838. Cumulative evidence defined.
- 1839. Corroborative evidence defined.

§ 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Evidence—law of, sec. 1825: kinds of, sec. 1827: degrees of, sec. 1826 *et seq.*: relevancy of, secs. 1868, 1870: production of, see sec. 1825, subd. 3, note: value and effect of, see sec. 1825, subd. 5, note.

§ 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

Definition of term—31 Cal. 201.

Proof—degree required, sec. 1826: order of, secs. 607, 2042: extent of, secs. 1867, 1869: limits of, secs. 1868, 1870: burden of, secs. 1869*n*, 1981: method of making, 31 Cal. 201.

§ 1825. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
3. For the production of legal evidence;
4. For the exclusion of whatever is not legal;
5. For determining in certain cases, the value and effect of evidence.

SUBDIVISION 1. Proof unnecessary—when, see sec. 1827, subd. 1, note.

SUBDIVISION 2. Presumptions—secs. 1959, 1961-1963 and no

SUBDIVISION 3. Production of evidence—secs. 1981-2054.

SUBDIVISION 4. Exclusion of evidence—secs. 1867, 1868

SUBDIVISION 5. Value and effect of evidence—sec. 206
sec. 1823 *et seq.*

§ 1826. The law does not require demonstration of a degree of proof as, excluding possible error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, a degree of proof which produces conviction in an uneducated mind.

Proof—sec. 1824 and note.

§ 1827. There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

SUBDIVISION 1. Knowledge of the court—sec. 1875 and no

SUBDIVISION 2. Witnesses—secs. 1878-1884.

SUBDIVISION 3. Writings—secs. 1887-1951.

SUBDIVISION 4. Other material objects—sec. 1954.

§ 1828. There are several degrees of evidence:

1. Primary and secondary;
2. Direct and indirect;
3. *Prima facie*, partial, satisfactory, indispensable and conclusive. [In effect July 1st, 1874.]

§ 1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a ten instrument is itself the best possible evidence of its existence and contents. [In effect July 1st, 1874.]

§ 1830. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents. [In effect July 1st, 1874.]

Secondary evidence—that conveyance authorized by corporations Cal. 192.

Contents of a writing—evidence of, sec. 1855.

§ 1831. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption and which in itself, if true, conclusively establishes the fact. For example: if the fact in dispute be an instrument, the evidence of a witness who was present and witnessed the making of it, is direct.

§ 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that act, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

Indirect evidence—secs. 1957-1963.

§ 1833. *Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of recording officer is *prima facie* evidence of a record, but it may afterward be rejected upon proof that there is no such record. [In effect July 1st, 1874.]

Prima facie evidence—seal of corporation as, 52 Cal. 192.

Disputable presumption—sec. 1963.

§ 1834. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterward connected with the act in dispute.

Connected with the fact in dispute—sec. 1868.

§ 1835. That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

Satisfactory evidence—to justify verdict, sec. 2061, subd. 5.

§ 1836. Indispensable evidence is that without which a particular fact cannot be proved.

Indispensable evidence—secs. 1967-1974.

§ 1837. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example: the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

Conclusive evidence—secs. 1906, 1962, 1978.

§ 1838. Cumulative evidence is additional evidence of the same character to the same point.

§ 1839. Corroborative evidence is additional evidence of a different character, to the same point.

TITLE I.
OF THE GENERAL PRINCIPLES OF
EVIDENCE.

- § 1844. One witness sufficient to prove a fact.
 § 1845. Testimony confined to personal knowledge.
 § 1846. Testimony to be in presence of persons affected.
 § 1847. Witness presumed to speak the truth.
 § 1848. One person not affected by acts of another.
 § 1849. Declarations of predecessor in title evidence.
 § 1850. Declarations which are a part of the transaction.
 § 1851. Evidence relating to third person.
 § 1852. Declaration of decedent evidence of pedigree.
 § 1853. Declaration of decedent evidence against his successor.
 § 1854. When part of a transaction proved, the whole is admitted.
 § 1855. Contents of writing, how proved.
 § 1856. An agreement reduced to writing deemed the whole.
 § 1857. Construction of language relates to place where used.
 § 1858. Construction of statutes and instruments, general rule.
 § 1859. The intention of the Legislature or parties.
 § 1860. The circumstances to be considered.
 § 1861. Terms to be construed in their general acceptation.
 § 1862. Written words control those printed in a blank form.
 § 1863. Persons skilled may testify to decipher characters.
 § 1864. Of two constructions, which preferred.
 § 1865. A written instrument construed as understood by parties.
 § 1866. Construction in favor of natural right preferred.
 § 1867. Material allegations only to be proved.
 § 1868. Evidence confined to material allegations.
 § 1869. Affirmative only to be proved.
 § 1870. Facts which may be proved on trial.

§ 1844. The direct evidence of one witness who is qualified to give it is entitled to full credit is sufficient for proof of any fact except perjury and treason.

One witness—witness, definition, sec. 1878: witness, competency, sec. 1879 *et seq.*: two witnesses for lost or destroyed will, sec. 1880: perjury and treason, more than one witness, sec. 1968.

§ 1845. A witness can testify of those facts which he knows of his own knowledge; that is, facts which are derived from his own perceptions, except in those express cases in which his opinions or inferences, or declarations of others, are admissible.

Opinions, inferences, declarations—see sec. 1870 and note thereon; money as to, 22 Cal. 565; 43 Cal. 485.

§ 1846. A witness can be heard only upon oath, and upon a trial he can be heard only

presence and subject to the examination of all the parties, if they choose to attend and examine.

Witness—defined, sec. 1878.

Witnesses—competency of, sec. 1879 *et seq.*

Oath or affirmation—administration of, secs. 2093-2097.

Examination of witnesses—secs. 2042-2064.

§ 1847. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

Witness—sec. 1878 *et seq.*

Presumed to speak the truth—sec. 1863, subd. 1: evidence of good character, sec. 2053.

Presumption repelled—manner of testifying, sec. 2061, subd. 2: character of testimony, sec. 2061, subd. 3: impeaching credit, secs. 2049, 2051, 2062: motives, hostility, 52 Cal. 390: contradictory evidence, sec. 2049, 2061.

Jury exclusive judges of credibility—sec. 2061.

§ 1848. The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another. [In effect July 1st, 1874.]

Particular relation—requisite, 2 Cal. 145: wife, where marriage in issue, 9 Cal. 593: husband, crime of, not imputed to wife, 49 Cal. 637: partner, agent, etc. sec. 1870, subd. 5: parties to fraud, 20 Cal. 598: officers and master of vessel, 33 Cal. 61: attorney, 47 Cal. 249.

Declaration, etc., of another—when admissible, secs. 1849-1853.

§ 1849. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

Construction of section—50 Cal. 478.

Declarations of predecessor—admissible, 12 Cal. 163; 30 Cal. 430; 33 Cal. 466; 38 Cal. 51; 42 Cal. 298: relating to the real property, 50 Cal. 478: while holding the title, 2 Cal. 148; 12 Cal. 496; 25 Cal. 202; 38 Cal. 278: against the former, 23 Cal. 347; 49 Cal. 294; 52 Cal. 348: estoppel by, 5 Cal. 84: analogous doctrine as to personality, 40 Cal. 474; and see "fraud," under *RES GESTÆ*, sec. 1850*a*.

§ 1850. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.

Res gestæ, part of—declarations, etc., forming. *Generally*, declarations, 35 Cal. 49; 52 Cal. 212; written declarations, etc. sec. 1946; 21 Cal. 374; 47 Cal. 294: declarations not forming, 42 Cal. 462. *Special instances*, assault, 35 Cal. 274; 49 Cal. 388: co. in furtherance of, 27 Cal. 572: declarations before others, subd. 3; 29 Cal. 637: dying declaration, sec. 1870, subd. 4; 35 Cal. 212: declarations in corporation books, when inadmissible, 52 Cal. 248: false and misleading sale for, 7 Cal. 391; 8 Cal. 109, 325; 15 Cal. 50; 23 Cal. 320; 202; 36 Cal. 205: insurance policy, *Fishbeck v. Phoenix Ins. Co.*, 24th, 1880, 5 Pac. C. L. J. 212: malice, 35 Cal. 373: writing, to explain, 1860.

§ 1851. And where the question in dispute between the parties is the obligation or duty of a third party, whatever would be the evidence for or against such party on the question is *prima facie* evidence between the parties. [July 1st, 1874.]

§ 1852. The declaration, act, or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation in cases where, on questions of pedigree, such reputation is admissible.

Declaration of decedent—sec. 1870, subd. 4.

Common reputation—on questions of pedigree, etc., sec. 1870, subd. 11.

§ 1853. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, and of his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

Decedent's declaration against interest—sec. 1870, subd. 4. 269; 45 Cal. 137; 46 Cal. 610; 47 Cal. 342: entries and other writings, 1946.

§ 1854. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into; and when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make the same understood, may also be given in evidence.

Part, admitting more—section applicable, 3 Cal. 106; 5 Cal. 529; 10 Cal. 371; 12 Cal. 564; 19 Cal. 689; 25 Cal. 123; 29 Cal. 36 Cal. 648; 33 Cal. 279: section inapplicable, 30 Cal. 65, 542; 32 Cal. 202: error under section, when not prejudicial, 50 Cal. 137: doctrine of cross-examination, etc., secs. 2047, 2048: related documents as evidence, 47 Cal. 294.

§ 1855. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. Where the original has been lost or destroyed; in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;

4. When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute;

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original or of the record must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents. [In effect July 1st, 1874.]

Nature of provision—9 Cal. 430; 10 Cal. 126.

Contents of writing—showing permissible, secs. 1937, 1969; 5 Cal. 67; 9 Cal. 593; 13 Cal. 84; 43 Cal. 162; 49 Cal. 264; 50 Cal. 353.

SUBDIVISION 1. Original lost or destroyed—proof requisite, 5 Cal. 89; 9 Cal. 430; 15 Cal. 183; 19 Cal. 640; diligent search unsuccessful, 5 Cal. 502, 517; 6 Cal. 460; 12 Cal. 104; 15 Cal. 63, 372; 18 Cal. 165; 19 Cal. 683; 20 Cal. 659; 29 Cal. 665; 30 Cal. 360; 33 Cal. 320; 49 Cal. 653, 671; beyond control, 8 Cal. 49; 13 Cal. 638; 19 Cal. 94; 27 Cal. 54; secondary evidence admitted, 8 Cal. 49; 12 Cal. 11; 17 Cal. 569; 22 Cal. 50; 26 Cal. 270; 51 Cal. 98; recorder's book as evidence, 17 Cal. 43.

SUBDIVISION 2. Original in possession of opponent—notice to produce, secs. 1938, 1939; 12 Cal. 403; 15 Cal. 63; secondary evidence admitted, 9 Cal. 593; 12 Cal. 403; 38 Cal. 584; denial of existence need not be proved, sec. 1869.

SUBDIVISION 3. Public records—7 Cal. 110, 238; 12 Cal. 20; 18 Cal. 79; public writings generally, secs. 1892-1926.

SUBDIVISION 4. Original on record—certified copy admissible when, 3 Cal. 427; 6 Cal. 488, 579; 12 Cal. 306; 13 Cal. 638; 25 Cal. 122; 27 Cal. 50, 238; 38 Cal. 216, 442.

§ 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dis-

pute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Parol evidence inadmissible—to vary or contradict written instrument, Civil Code, sec. 1639; 2 Cal. 37; 4 Cal. 355; 7 Cal. 282, 9 Cal. 10 Cal. 288; 12 Cal. 170; 19 Cal. 354; 22 Cal. 155; 24 Cal. 411; 35 Cal. 594; 48 Cal. 359; 50 Cal. 553; 51 Cal. 341; 52 Cal. 36; written oral negotiations, Civil Code, sec. 1625; 23 Cal. 256; 24 Cal. 325; 43 Cal. 159; contract must be complete, 22 Cal. 501; 23 Cal. 112; 37 Cal. 437; recitals in written instrument conclusive, 1962, subd. 2 and notes: rule confined to parties and those under them, 50 Cal. 250.

Parol evidence—admissible, alterations and erasures, to show, sec. 1982; 48 Cal. 147; ambiguity, to explain, 11 Cal. 194; circumstances see surrounding circumstances: consideration, to show real, 2; 48 Cal. 97; deed, see mortgage; discharge, to show, 2; waiver: fraud, to establish, see Civil Code, sec. 1640; mistake, to perfect, to correct, sec. 1856, subd. 1, *supra*; Civil Code, sec. 3399-3402; 13 Cal. 556; 17 Cal. 55; 19 Cal. 661; 23 Cal. 121; 29 Cal. 609; 48 Cal. 239; 50 Cal. 353; 51 Cal. 172; mortgage, to prove, 13 Cal. 116; 15 Cal. 287; 24 Cal. 383; 29 Cal. 18; 36 Cal. 29; 37 Cal. 452; receipt, to explain, 10 Cal. 44; revision and reformation of contracts, for, Civil Code, 3399-3402; 21 Cal. 122; 23 Cal. 249; 45 Cal. 79; 46 Cal. 346, 644; surrounding circumstances, to show, sec. 1860 and notes, 51 Cal. 125; 52 Cal. 120; trust, or absence of, to show, 20 Cal. 126; 22 Cal. 580; 53 Cal. 580; validity of agreement controverted, where, sec. 1856, subd. 1, 49 Cal. 610; 50 Cal. 595; waiver or discharge, to show, 16 Cal. 135; 30 Cal. 547; 39 Cal. 169; 50 Cal. 9; 51 Cal. 166, 575.

§ 1857. The language of a writing is to be interpreted according to the meaning it bears in the place of execution, unless the parties have reference to a different place.

Interpretation of contract—*lex loci*, Civil Code, sec. 1616.

§ 1858. In the construction of a statute or instrument the office of the judge is simply to ascertain and give effect to what is in terms or in substance contained therein; to insert what has been omitted, or to omit what has been inserted; and where there are several provisions particular, such a construction is, if possible, to be adopted as will give effect to all.

Construction—generally, sec. 1859 and notes: declaring what is intended, 24 Cal. 539; giving effect to all, Civil Code, secs. 1641, 354, 162, 200; 3 Cal. 473; 5 Cal. 169; 6 Cal. 47; 22 Cal. 11; 24 Cal. 518; 25 Cal. 240, 412; 32 Cal. 499; 34 Cal. 183; 38 Cal. 572.

§ 1859. In a construction of a statute, the intention of the Legislature, and in the construction of an instrument, the intention of the parties, is to be pursued, if possible; and when a general and particular provision

consistent, the latter is paramount to the former. So a particular intent will control a general one, that is inconsistent with it.

Construction of statutes—Amendments, and conflicting statutes, sec.

Conflict of statutes, 51 Cal. 474; Codes, 51 Cal. 295; and conflicting statutes, sec. 18*n*. *Constitutionality*, generally, 13 Cal. 175; 22 Cal. 393; Cal. 539; 26 Cal. 135; 36 Cal. 379; 41 Cal. 149; 47 Cal. 222; 49 Cal. 117; particular instances, 2 Cal. 183, 198, 424, 524, 530; 5 Cal. 24, 86; 6 Cal. 143; 7 Cal. 147; 13 Cal. 150, 519; 14 Cal. 12, 566; 15 Cal. 429; 18 Cal. 678; 19 Cal. 513; 22 Cal. 293; 24 Cal. 518, 638; 26 Cal. 161; 48 Cal. 279; 49 Cal. 402, 435, 438, 446, 449, 478, 557; 50 Cal. 284; 51 Cal. 15, 266, 269, 352, 381; 52 Cal. 196, 208, 482, 606; 53 Cal. 48, 152, 475, 608; *Ex parte Fraser*, Jan. 25th, 1880, 4 Pac. C. L. J. 497; *Hib. Sav. & L. Soc. v. Jordan*, May 19th, 1880, 5 Pac. C. L. J. 381; under Const. Cal. 1879, 53 Cal. 745; *Weil v. Kenfield*, March 2nd, 1880, 4 Pac. C. L. J. 523; *McDonald v. Patterson*, March 2nd, 1880, 5 Pac. C. L. J. 41; *Ex parte Toland*, March 19th, 1880, 5 Pac. C. L. J. 664; *Ewing v. Hyatt v. Allen*, March 23rd, 1880, 5 Pac. C. L. J. 664; *Ewing v. Hyatt v. Allen*, March 23rd, 1880, 5 Pac. C. L. J. 664; *Desmond v. Dunn*, June 21st, 1880, 5 Pac. C. L. J. 579; *S. F. v. S. V. W. Co.*, June 22nd, 1880, 5 Pac. C. L. J. 650; *Oakland Text-Book Case*, June 22nd, 1880, 5 Pac. C. L. J. 622. *Correlative statutes*, sec. 18*n*; 53 Cal. 199. *Curative acts*, 47 Cal. 236; 51 Cal. 86, 91, 92; 53 Cal. 90, 233. *Directory statutes*, generally, Cal. 524; 33 Cal. 492; 36 Cal. 595; 48 Cal. 146; particular instances, 4 Cal. 275; 32 Cal. 68; 44 Cal. 229; 48 Cal. 133; 49 Cal. 157; 52 Cal. 459, 553; *Arbitrary construction*, see MANDATORY ACTS. *Forfeiture*, statutes imposing strictly construed, 1 Cal. 55. *Generally*, 48 Cal. 124, 127, and RULES. *Grant*, legislative, 13 Cal. 458. *Mandatory acts*, 36 Cal. 595; Cal. 563; 51 Cal. 3; 53 Cal. 245. *Notice*, constructive, strict construction of provisions for, 1 Cal. 162; 7 Cal. 294; 20 Cal. 81; 31 Cal. 356; but see Code, see sec. 4. *Penal statutes*, strict construction abolished by Codes, 45 Cal. 431; 49 Cal. 68. *Remedial statutes*, 2 Cal. 596; 3 Cal. 119; 6 Cal. 470. *Repeal of statutes*, see sec. 18 and notes; 15 Cal. 294; *Lamb v. Cottler*, March 17th, 1880, 5 Pac. C. L. J. 140; *Hib. S. & L. Soc. v. Jordan*, May 19th, 1880, 5 Pac. C. L. J. 381; statutes continued under Codes, Cal. 393. *Retroactive statutes*, 53 Cal. 274, and see sec. 3 and note; and not, 50 Cal. 244; 51 Cal. 86, 91, 92, 360; 53 Cal. 81. *Rules*, Code, construction for, secs. 4-15 and notes; contemporaneous exposition as aid, Code, sec. 3535; 1 Cal. 523; 31 Cal. 86; 36 Cal. 638; expression of one thing is exclusion of another, 26 Cal. 378; generally, see secs. 1857-1860, 1860-1866; intention of legislature is guide, 6 Cal. 216; 15 Cal. 294; Cal. 11; 24 Cal. 539; 30 Cal. 325; 31 Cal. 86; 36 Cal. 595; legislative discussions immaterial, 28 Cal. 95; 41 Cal. 146; particular provision, etc., Controls, Civil Code, sec. 3534; 7 Cal. 96; retrospective construction not enforced, 27 Cal. 159; title as aid, 16 Cal. 365; 19 Cal. 512; 36 Cal. 595; 47 Cal. 222; 51 Cal. 303; 52 Cal. 459, 553; words and phrases, as to, secs. 15, 17; 13 Cal. 518; 24 Cal. 539; 43 Cal. 332; and where error in, see 28 Cal. 114. *Special law*, 53 Cal. 199. *Time*, statutes fixing, see COMPUTATION OF TIME, sec. 12*n*. *Various cases*, 49 Cal. 407, 525, 563, 569; 50 Cal. 64, 70, 86, 153, 188, 195, 248, 493, 561; 51 Cal. 3, 12, 273, 388, 406, 533; Cal. 21, 199, 386, 416, 475, 482, 571; and see under CONSTITUTIONALITY. *Construction of instruments—Bonds*, 51 Cal. 473; see UNDERWRITINGS GENERALLY, sec. 941*n*, and CONTRACTS, *infra*. *Charters*, Cal. 647. *Contracts—conditions in*, sec. 457*n*; 27 Cal. 27; 53 Cal. 721; *Forfeiture*, imposing strictly construed, 1 Cal. 55; 48 Cal. 248; insurance policy, 51 Cal. 101; *Helbing v. Svea Ins. Co.*, Feb. 12th, 1880, 4 Pac. C. L. J. 555; *Fishbeck v. Phoenix Ins. Co.*, March 24th, 1880, 5 Pac. C. L. J. 212; *Williams v. Hartford F. Ins. Co.*, March 29th, 1880, 5 Pac. C. L. J. 227; *Interpretation of*, Civil Code, secs. 1635-1661, 1731, 1733, 1734, 2053, 3534-3541, 3542; Political Code, sec. 3222; 32 Cal. 376; 50 Cal. 207, 417, 585; Cal. 94, 166, 188, 223, 516, 554; 52 Cal. 306, 624; 53 Cal. 46; lease, 49 Cal. 51; 51 Cal. 236; 53 Cal. 461; promissory note, *Chamberlain v. Pac. Wool Co.*, Feb. 1st, 1880, 5 Pac. C. L. J. 2; stipulation, 51 Cal. 629. *Deeds*,

construction and interpretation of, 15 Cal. 21; 17 Cal. 44; 22 Cal. 136; 25 Cal. 175; 26 Cal. 88; 29 Cal. 407; 41 Cal. 485; 47 Cal. 1 Cal. 171, 422, 435, 532, 613, 655; 51 Cal. 94, 188, 198, 352, 640; 52 Cal. 53 Cal. 135: description in, sec. 2077 and notes; 34 Cal. 334; 56 Cal. 333; 52 Cal. 154, 579: mistake in, *Leonis v. Lazzarovich*, June 5 Pac. C. L. J. 492: taxes, for, 50 Cal. 70; 51 Cal. 193; 53 Cal. 666 v. O'Connell, April 7th, 1880, 5 Pac. C. L. J. 294; *Hearst v. Eg* Aug. 18th, 1880. *Generally*, secs. 1856-1866 and notes. *Mortg* 744; 51 Cal. 188; 53 Cal. 487. *Powers of attorney*, 47 Cal. 242; 48 Cal. 198. *Wills*, see CIVIL CODE, secs. 1310, 1317-1351, 1376; 48 Cal. 165, 568, 643; 49 Cal. 76, 506; 50 Cal. 595.

§ 1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of facts relating to it, may also be shown, so that the judge be in the position of those whose language he is to interpret.

Construction of instruments—sec. 1859n.

Surrounding circumstances—may be shown, Civil Code, 10 Cal. 95, 589; 12 Cal. 148; 13 Cal. 116; 18 Cal. 137; 22 Cal. 150; 26 Cal. 83; 29 Cal. 299; 33 Cal. 202; 47 Cal. 67; 48 Cal. 165, 369: evidence, 11 Cal. 194; 15 Cal. 21; 22 Cal. 497; 23 Cal. 339; 32 Cal. 595: usage, sec. 1870, subd. 12: descriptive part of conveyance, 2077; 34 Cal. 334, 624; 36 Cal. 606; 38 Cal. 482.

§ 1861. The terms of a writing are presumed to be used in their primary and general acceptation, but evidence is nevertheless admissible that they have a technical, or otherwise peculiar signification, and used and understood in the particular instance, in which case the agreement must be construed accordingly.

Peculiar signification of terms—may be shown, 14 Cal. 262; 47 Cal. 151: compare Civil Code, secs. 1644, 1645.

§ 1862. When an instrument consists partly of printed words and partly of a printed form, and the two are consistent, the former controls the latter.

Compare—Civil Code, sec. 1651.

§ 1863. When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, who understand the language, is admissible to determine the characters or the meaning of the language.

See—sec. 1870, subds. 9, 10, and notes.

§ 1864. When the terms of an agreement have a different intended in a different sense by the different parties, that sense is to prevail against either party in which the supposed the other understood it, and when different constructions of a provision are otherwise equally

that is to be taken which is most favorable to the party in whose favor the provision was made.

Compare—Civil Code, secs. 1640, 1654.

§ 1865. A written notice, as well as every other writing, is to be construed according to the ordinary acceptation of its terms. Thus, a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment, and the same refused, and that the holder looks for payment to the person to whom the notice is given.

Ordinary acceptation—see sec. 1861; compare Civil Code, sec. 1644; notice of dishonor, Civil Code, sec. 3143; 4 Cal. 213; 8 Cal. 626; 14 Cal. 9; 24 Cal. 379.

§ 1866. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.

§ 1867. None but a material allegation need be proved. Material allegation—defined, sec. 463; in complaint, see Code, heading, sec. 426a; 48 Cal. 439; not controverted, sec. 462.

§ 1868. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

Correspondence between evidence and allegations—28 Cal. 67; variance, secs. 469-471; tender cannot be proven unless pleaded, 53 Cal. 597.

Relevant evidence—required, 4 Cal. 229; 21 Cal. 23; 27 Cal. 422; 30 Cal. 252; 48 Cal. 434, 545; *Smith v. East Branch M. Co.*, Feb. 12th, 1880, 4 Pac. C. L. J. 563; admissible evidence under requirement, sec. 1870 and notes; objection or exception to evidence, sec. 646a.

Collateral fact—connecting, sec. 1870 and notes; 51 Cal. 75; *Bancroft v. Heringhi*, Feb. 4th, 1880, 4 Pac. C. L. J. 536; entirely irrelevant, 49 Cal. 374; 52 Cal. 225, 605; 53 Cal. 735; credibility of witness, secs. 1847 and 1870, subd. 16.

§ 1869. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence

of a document, the custody of which belongs to opposite party.

Affirmative allegations—admitted facts need not be proved; 35 Cal. 306; 41 Cal. 127, 133; 42 Cal. 225; 47 Cal. 20, 249; affirmative in answer unproven, disregarded, 53 Cal. 99; burden of proof 1981; 30 Cal. 662; 31 Cal. 104; 53 Cal. 335; *Dougherty v. Harris* 5th, 1880, 5 Pac. C. L. J. 81; submission on pleadings, 52 Cal. 99; allegations to be proven, 31 Cal. 218; 51 Cal. 217; 53 Cal. 713; *Barney*, June 30th, 1880, 5 Pac. C. L. J. 590.

Negative allegation—some evidence required, 26 Cal. 611; sec. 437n.

SUFFICIENCY OF EVIDENCE IN VARIOUS CASES

Breach of promise of marriage—*Hanks v. Naglee*, Dec. 2, 4 Pac. C. L. J. 456; *Boingneres v. Boulon*, Feb. 7th, 1880, 4 Pac. 528. **Carrier**—notice of rules of, 22 Cal. 537. **Certificate of purchase**—sec. 1925 and notes; 43 Cal. 126; 50 Cal. 169. **Contract**—52 Cal. 5 version—23 Cal. 349; 52 Cal. 586; 53 Cal. 20, 21, 261, 399. **Corporation**—32 Cal. 161; 52 Cal. 192; 53 Cal. 346. **Damages**—50 Cal. 176, 194, 195, 260. **Divorce**—53 Cal. 26. **Ejectment**—14 Cal. 465, 609; 15 Cal. 331; 16 Cal. 572; 22 Cal. 516, 615; 30 Cal. 200; 35 Cal. 650; 41 Cal. 231, 402; 44 Cal. 234, 386; 45 Cal. 173, 236; 46 Cal. 258; 48 Cal. 49 Cal. 655; 50 Cal. 200, 211; 51 Cal. 198, 465; 53 Cal. 362. **Forcible entry and detainer**—48 Cal. 361. **Fraud**—50 Cal. 285, 349. **General principles of evidence**, sec. 1828 *et seq.*: proof required, sec. 1828 and effect of evidence, sec. 2061. **Malicious prosecution**—7 Cal. 217; 29 Cal. 644; 44 Cal. 144; 50 Cal. 206; 51 Cal. 140; 53 Cal. 321. **Marriage**—sec. 1963, subd. 30; 47 Cal. 621; breach of promise that head, *supra*. **Money paid**—action for, 52 Cal. 81; 53 Cal. 35. **Negligence**—50 Cal. 578, 581; 52 Cal. 602; 53 Cal. 35. **Possessions**—generally, 18 Cal. 136; 24 Cal. 343; 31 Cal. 461; 36 Cal. 563; 43 Cal. 406, 614; 49 Cal. 202; 52 Cal. 89. **Power of attorney**—321. **Tax suits**—51 Cal. 298, 580. **Trespass**—50 Cal. 435, 496.

§ 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

1. The precise fact in dispute;
2. The act, declaration, or omission of a party, in evidence against such party;
3. An act or declaration of another, in the presence and within the observation of a party, and his connection thereto;
4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal cases the act or declaration of a dying person, made under the sense of impending death, respecting the cause thereof; and
5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, with

scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;

6. After proof of a conspiracy, the act or declaration of a conspirator against his coconspirator, and relating to the conspiracy;

7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty;

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;

12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;

14. The contents of a writing, when oral evidence thereof is admissible;

15. Any other facts from which the facts in issue are presumed or are logically inferable;

16. Such facts as serve to show the credibility of a witness, as explained in section eighteen hundred and forty-seven.

Relevant evidence required—sec. 1868 and notes.

RELEVANT EVIDENCE.

Subd. 1, Precise fact—in dispute, kinds of evidence, sec. 1827 and notes. Subd. 2, Admissions—account by, 13 Cal. 427; 18 Cal. 634; 34 Cal. 180; 50 Cal. 438: acquiescence, by, see note to subd. 3, *infra*; 13 Cal. 427; 22 Cal. 232; 50 Cal. 438: acknowledgment, by, 22 Cal. 565: assessment, by, 25 Cal. 684: compromise, not by offer to, sec. 2078: counsel, by, 5

Cal. 79; 22 Cal. 232: entries by, sec. 1946 and notes: estoppels, 1962, subd. 3 and note: pleadings, in, 14 Cal. 36; 34 Cal. 178; 39 Cal. 249. and see under AFFIRMATIVE ALLEGATIONS, see publication of advertisement, by, 35 Cal. 25: relevancy, of, sec. Cal. 654: third person, by, secs. 1848-1853, also subd. 4-6 of this and notes to same, *infra*: testimony, by, 3 Cal. 396; 22 Cal. 232; 485; 45 Cal. 125: value of, sec. 2061, subd. 4: witness testifying 1845. Confessions—acquiescence, from, see note to subd. criminal cases, in, 50 Cal. 415: divorce cases, in, sec. 2079: not void inadmissible, 49 Cal. 342. Subd. 3, Conduct in presence of an acquiescence, admission or confession implied from, 32 Cal. 100; 171: conversation, 29 Cal. 637; 48 Cal. 236: evidence admissible under this head, 53 Cal. 613; *People v. Ah Yute*, Jan. 23rd, 1880, 4 Pac. J. 494: presence of accused, declarations must be made in, 52 Cal. 363; 24 Cal. 17, 640; 35 Cal. 49; 43 Cal. 29; 44 Cal. 435; 49 Cal. 652; 51 Cal. 363. Subd. 5, Partner—act or declaration of, partnership books, 49 Cal. 652; *Butler v. Beach*, May 26th, 1880, 5 Pac. C. L. J. 415: during existing partnership, only, 23 Cal. 101: after proof of partnership, 3 Cal. 945; 8 Cal. 579; 44 Cal. 532. Agent—act or declaration of, after proof of the agency, 14 Cal. 35; 23 Cal. 152; 30 Cal. 253; 40 Cal. 396, and see sec. 425: within scope of agency, 1 Cal. 221; 23 Cal. 468; during existing agency, 36 Cal. 571: forming part of the *res gestæ*, sec. 1850. Subd. 6, Coconspirators—act or declaration as to, 39 Cal. 388; 49 Cal. 166, 171, 643. Subd. 7, Res gestæ—sec. 1850n. Former testimony of decedent, etc.—15 Cal. 275; 16 Cal. 423; 269; 47 Cal. 388: out of jurisdiction, does not apply to witness in another county, 51 Cal. 582. Subd. 9, Experts—degree of skill requisite for testimony, 9 Cal. 56; 31 Cal. 115; 47 Cal. 388; 50 Cal. 462; *Estate of T. April 7th, 1880*, 5 Pac. C. L. J. 286: handwriting, as to, 47 Cal. 294, 50 Cal. 462: technical matters, in, sec. 1861; 6 Cal. 103: testimony when and how far receivable, 10 Cal. 341; 17 Cal. 416; 40 Cal. 405; 42 Cal. 32; *Estate of Toomes*, April 7th, 1880, 5 Pac. C. L. J. 286: on question of sanity, see subd. 10 and note, *infra*. Subd. 10, Sanity—opinion of jury, 43 Cal. 32; *Estate of Toomes*, April 7th, 1880, 5 Pac. C. L. J. 286. Subd. 11, Common reputation—public or general interest, 2 Cal. 101: not to prove partnership, 3 Cal. 98; 6 Cal. 455: pedigree, declaration of, decedent, etc., sec. 1852: boundary, 2 Cal. 45; 25 Cal. 554. Subd. 12, Usage—character of contract, explaining, 17 Cal. 595; 50 Cal. 628. Subd. 13, Common reputation—pedigree, etc., see subd. 11, *supra*. Subd. 14, Contents of writing—where oral evidence is admissible, see secs. 1855, 1856 and notes. Subd. 15, Indirect evidence—generally, secs. 1957-1963: inference, secs. 1958, 1960: presumption, secs. 1959, 1961, 1962, 1963: instances of inferential evidence, 4 Cal. 33 Cal. 57; 46 Cal. 392; *Fishbeck v. Phoenix Ins. Co.*, March 24th, 1880, 5 Pac. C. L. J. 212: presumptive evidence of ownership, 52 Cal. 380. Subd. 16, Credibility of witness—see secs. 1847, 1868: assault and hostility, 52 Cal. 380.

EVIDENCE ADMISSIBLE IN PARTICULAR CASES

Account—13 Cal. 427; 50 Cal. 108. Amended complaint—51 Cal. 333. Answer—13 Cal. 87, 163; 16 Cal. 172. Contract—conditions, precedent of, *Williams v. Hartford Fire Ins. Co.*, March 29th, 1880, 5 Pac. C. L. J. 212.

L. J. 227. Conversion—15 Cal. 412; 16 Cal. 82. Corporation—50 Cal. 436. Cross demand—sec. 440. Damages—1 Cal. 354; 5 Cal. 414; 6 Cal. 55, 223; 14 Cal. 454; 18 Cal. 689; 35 Cal. 372. Debris—18 Cal. 450. Escape—Political Code, sec. 4182. Exemptions—15 Cal. 266. Forcible entry, etc.—27 Cal. 565; 28 Cal. 532. Fraud—7 Cal. 391; 12 Cal. 465; 15 Cal. 50; 23 Cal. 331; 34 Cal. 100; *Bancroft v. Heringhi*, Feb. 4th, 1880, 4 Pac. C. L. J. 536. Indorsement—35 Cal. 121. Land cases—ejectment, 4 Cal. 79; 10 Cal. 456; 15 Cal. 283; 21 Cal. 291; 24 Cal. 124; 26 Cal. 310; 28 Cal. 408; 30 Cal. 200, 635; 41 Cal. 263; 44 Cal. 353; 46 Cal. 549; 47 Cal. 181, 253; 48 Cal. 184, 408; 49 Cal. 536; 50 Cal. 64, 142; 53 Cal. 39, 436. Forcible entry, 37 Cal. 60; Mexican grant, 29 Cal. 312; *Chapman v. Quinn*, March 13th, 1880, 5 Pac. C. L. J. 162; mining claims, 36 Cal. 214, 310; possessory actions, generally, 12 Cal. 50; 21 Cal. 298; 23 Cal. 264, 536; 27 Cal. 253; 29 Cal. 412; 36 Cal. 333; 37 Cal. 389; 40 Cal. 249; 43 Cal. 217, 485; 44 Cal. 479; 48 Cal. 178, 346; 50 Cal. 195; public lands, 27 Cal. 87; 28 Cal. 408, 432; 31 Cal. 461; 37 Cal. 389; 47 Cal. 265; 49 Cal. 242; 50 Cal. 64, 195; *Chapman v. Quinn*, March 13th, 1880, 5 Pac. C. L. J. 162; *Knight v. Roche*, March 13th, 1880, 5 Pac. C. L. J. 106; quieting title, 28 Cal. 194; 34 Cal. 564; 49 Cal. 374; *Wilson v. Madison et al.*, April 29th, 1880, 5 Pac. C. L. J. 340. Libel and slander—sec. 461; 39 Cal. 74; 44 Cal. 641; 51 Cal. 75. Limitations—Statute of, 52 Cal. 262. Malicious prosecution—18 Cal. 83; 35 Cal. 373; 39 Cal. 485; 44 Cal. 609. Marriage—breach of promise of, 47 Cal. 194. Negligence—27 Cal. 425; 35 Cal. 247, 534; 36 Cal. 235, 578; 40 Cal. 274; 43 Cal. 437; 44 Cal. 543; 45 Cal. 324; 48 Cal. 426; 50 Cal. 7, 578. Note—50 Cal. 162. Notice—constructive, 12 Cal. 241. Services—action for, 24 Cal. 399; 26 Cal. 305; 42 Cal. 465; 46 Cal. 256; 46 Cal. 62; 50 Cal. 222. Tax suits—53 Cal. 233. Trespass—45 Cal. 640.

TITLE II.

Of the Kinds and Degrees of Evidence

- CHAP. I. Knowledge of the court, § 1875.
II. Witnesses, §§ 1878-1884.
III. Writings, §§ 1887-1951.
IV. Material objects presented to the senses,
than writings, § 1954.
V. Indirect evidence, §§ 1957-1963.
VI. Indispensable evidence, §§ 1967-1974.
VII. Conclusive and unanswerable evidence, §

CHAPTER I.

KNOWLEDGE OF THE COURT.

§ 1875. Certain facts of general notoriety assumed to be true. Specification of such facts.

§ 1875. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions;
2. Whatever is established by law;
3. Public and private official acts of the legislative, executive, and judicial departments of this State and of the United States;
4. The seals of all the courts of this State and of the United States;
5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;
6. The existence, title, national flag, and seal of every State or sovereign recognized by the executive power of the United States;
7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;
8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference.

JUDICIAL NOTICE.

Subd. 1, Meaning of English words and phrases, etc.—41 Cal. 477; 49 Cal. 598; 51 Cal. 429. Subd. 2, Established by law—whatever is, Statutes, 30 Cal. 253: District Courts, before amdts. 1880, 17 Cal. 371; 37 Cal. 241; 42 Cal. 400; 48 Cal. 178. Subd. 3, Official acts of governmental departments—Congressional, 27 Cal. 167: of State Legislature, 43 Cal. 560; 52 Cal. 171: judicial department, before Code, 31 Cal. 229: private acts, before Code, 32 Cal. 447: removal of county seat, 47 Cal. 488. Subd. 4, Seals—patent, 14 Cal. 467. Subd. 5, Chief governmental officers—incumbency, signatures, seals: before Code, 15 Cal. 53; 32 Cal. 106. Subd. 8, Laws of nature, etc.—geographical divisions, 1 Cal. 9; 5 Cal. 140; 39 Cal. 40: streets of city, *Whiting v. Quackenbush*, March 13th, 1880, 5 Pac. C. L. J. 153. Books and documents—as aid see sec. 1936.

CHAPTER II.

WITNESSES.

- § 1878. Witnesses defined.
- § 1879. All persons capable of perceptions and communication of sense, and of communicating their perceptions to others, are competent to be witnesses.
- § 1880. Persons who cannot testify.
- § 1881. Persons in certain relations to parties prohibited.
- § 1882. When privileged persons must testify.
- § 1883. Judge or a juror may be witness.
- § 1884. When an interpreter to be sworn.

§ 1878. A witness is a person whose declaration is received as evidence for any purpose, whether the declaration be made on oral examination or by deposition or affidavit.

Compare—sec. 2002.

Oral examination—sec. 1846; general rules of, sec. 2042 *et seq.*

Deposition—secs. 2019-2038.

Affidavit—secs. 2009-2015.

§ 1879. All persons, without exception, otherwise specified in the next two sections, who, having sufficient sense, can perceive, and, perceiving, can make their perceptions to others, may be witnesses. The parties to an action, and neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; also those who have been convicted of crime; nor persons who are disqualified on account of their opinions on matters of religious belief, although, in every case, the credibility of the witness may be drawn in question, as provided in section 1882. The provisions of this section extend to one hundred and forty-seven.

Competency of witnesses—no exclusion for religious beliefs, sec. 1882; nor for nationality or color, 45 Cal. 57; attorney as witness, sec. 1882.

Persons incompetent—to be witnesses, sec. 1880.

§ 1880. The following persons cannot be witnesses:
1. Those who are of unsound mind at the time of the production for examination;

2. Children under ten years of age, who are incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truthfully;

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator.

upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person. [In effect April 16th, 1880.]

SUBDIVISION 2. Children—10 Cal. 66.

SUBDIVISION 3. Parties to action against executor, etc.—claim, for family allowance, inapplicable to, 52 Cal. 568; applies to nominal parties, 50 Cal. 420; party may testify in behalf of estate, 51 Cal. 618; 52 Cal. 336; depositions, when not admissible, 51 Cal. 101; assignors of parties, included by amdt. 1880; as to any matter, etc., before death, etc., added by amdt. 1880.

§ 1881. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

SUBDIVISION 1. Husband—when may be witness against wife, 53 Cal. 425.

SUBDIVISION 2. Attorney—privileged communications, 5 Cal. 450; Cal. 284; not privileged, 23 Cal. 331; 29 Cal. 48; 36 Cal. 489; strict construction, 36 Cal. 489.

SUBDIVISION 3. Confession to priest—privileged provision inapplicable, Estate of Toomes, April 7th, 1880, 5 Pac. C. L. J. 286.

§ 1882 of the Code of Civil Procedure of the State of California is hereby repealed. [In effect February 1, 1876.]

§ 1883. The judge himself or any juror may be sworn as a witness by either party; but in such case it is at the discretion of the court or judge to order the trial postponed or suspended, and to take place before a judge or jury.

Justice—2 Cal. 360.

Juror—48 Cal. 90.

§ 1884. When a witness does not understand and cannot understand the English language, an interpreter must be sworn and appointed to interpret for him. Any person, a resident of the county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served in like manner as a subpoena, and returned in like manner as a subpoena. Any person so summoned, who fails to attend at the time and place named in the summons, is guilty of a contempt.

Interpreter—short-hand notes of testimony taken through, *Lee Fat*, April 8th, 1880, 5 Pac. C. L. J. 282.

Subpoena—sec. 1985 *et seq.*

Contempt—secs. 1209, 1219.

CHAPTER III.

WRITINGS.

- ART. I. WRITINGS IN GENERAL.
 II. PUBLIC WRITINGS.
 III. PRIVATE WRITINGS.

ARTICLE I.

WRITINGS IN GENERAL.

- § 1887. Writings, public and private.
 § 1888. Public writings defined.
 § 1889. All others private.

§ 1887. Writings are of two kinds:

1. Public; and,
2. Private.

§ 1888. Public writings are:

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country;

2. Public records, kept in this State, of private writings.

SUBDIVISION 2. Certified copy from records—as primary evidence, 49 Cal. 210; 52 Cal. 171.

§ 1889. All other writings are private.

ARTICLE II.

PUBLIC WRITINGS.

- § 1892. Every citizen entitled to inspect and copy public writings.
 § 1893. Public officers bound to give copies.
 § 1894. Four kinds of public writings.
 § 1895. Laws, written or unwritten.
 § 1896. Written laws defined.
 § 1897. Constitution and statutes.
 § 1898. Public and private statutes defined.
 § 1899. Unwritten law defined.
 § 1900. Books containing laws presumed to be correct.
 § 1901. Public seal authenticates a law or document.
 § 1902. Other evidence of laws of other States.
 § 1903. Recitals in statutes, how far evidence.
 § 1904. Judicial record defined.
 § 1905. Record, how authenticated as evidence.
 § 1906. Record of a foreign country, how authenticated.

- 1907. Oral evidence of a foreign record.
- 1908. Effect of a judgment upon rights in various cases.
- 1909. Effect of other judicial orders, when conclusive.
- 1910. Where parties are to be deemed the same.
- 1911. What deemed adjudged in a judgment.
- 1912. Where sureties bound, principal is also.
- 1913. Record of another State, its effect.
- 1914. Record of a court of admiralty.
- 1915. Effect of a foreign judgment.
- 1916. Manner of impeaching a record.
- 1917. The jurisdiction necessary in a judgment.
- 1918. Manner of proving other official documents.
- 1919. Public record of private writing evidence.
- 1920. Entries in official books primary evidence.
- 1921. Justice's judgment in other States, how proved.
- 1922. Same.
- 1923. Contents of other official certificates.
- 1924. Provisions in relation to States apply to Territories.
- 1925. Certificates of purchase primary evidence of ownership.
- 1926. Entries made by officers or boards primary evidence.

§ 1892. Every citizen has a right to inspect and copy of any public writing of this State, except as wise expressly provided by statute.

Public records, etc., open to inspection—Political Code, sec

§ 1893. Every public officer having the custody of public writing, which a citizen has a right to inspect, bound to give him, on demand, a certified copy of the same, on payment of the legal fees therefor, and such copy admissible as evidence in like cases and with like effect as the original writing. [In effect July 1st, 1874.]

Certified copy—from records, as primary evidence, 49 Cal. 21

§ 1894. Public writings are divided into four classes:

1. Laws;
2. Judicial records;
3. Other official documents;
4. Public records, kept in this State, of private writings.

§ 1895. Laws, whether organic or ordinary, are either written or unwritten.

§ 1896. A written law is that which is promulgated by public writing, and of which a record is in existence.

§ 1897. The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained in its Constitution and statutes, and in the Constitution and statutes of the United States.

§ 1898. Statutes are public or private. A public statute is one which concerns only certain designated individuals, and affects only their private rights. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All

statutes are public, in which are included statutes creating or affecting corporations.

§ 1899. Unwritten law is the law not promulgated and recorded, as mentioned in section eighteen hundred and ninety-six, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and the treatises of learned men.

§ 1900. Books printed or published under the authority of a sister State or foreign country, and purporting to contain the statutes, code, or other written law of such State or country, or proved to be commonly admitted in the tribunals of such State or country, as evidence of the written law thereof, are admissible in this State as evidence of such law.

Books—historical, etc., sec. 1936: resort to, sec. 1875: authority of, sec. 1963, subd. 35, 36.

Sister State—scope of expression, sec. 1924.

§ 1901. A copy of the written law or other public writing of any State or country, attested by the certificate of the officer having charge of the original, under the public seal of the State or country, is admissible as evidence of such law or writing. [In effect July 1st, 1874.]
Certificate—requisites of, sec. 1923.

§ 1902. The oral testimony of witnesses, skilled therein, is admissible as evidence of the unwritten law of a sister State or foreign country, as are also printed and published books of reports of decisions of the courts of such State or country, or proved to be commonly admitted in such courts.

See—sec. 1900n.

§ 1903. The recitals in a public statute are conclusive evidence of the facts recited, for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

Recitals—in written instrument, sec. 1962, subd. 2.

§ 1904. A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

Judicial records—judgment roll, sec. 670: papers in insolvency, 18 Cal. 41: execution book as evidence, sec. 683: swamp land papers, certified copies admissible, 52 Cal. 171.

§ 1905. A judicial record of this State, or United States, may be proved by the production of original, or by a copy thereof certified by the other person having the legal custody thereof. The sister State may be proved by the attestation of the clerk, and the seal of the court annexed, if the clerk and seal, together with a certificate of the judge or presiding magistrate, that the attestation is in due form.

Judicial record of this State, etc.—need of seal, sec. 153; appointment of executor, etc., sec. 1429; judgment roll, when no exemption, 47 Cal. 21.

Judicial record of a sister State—U. S. Const. art. 4, sec. 428; 7 Cal. 247; 12 Cal. 181; of United States as to lands, 18 Cal. 181.

Certificate—sec. 1923.

§ 1906. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the judge, or presiding magistrate, that the person making the attestation is the clerk of the court, or the legal keeper of the record, and, in either case, that the signature of the person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister, ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country. [In effect since 1st, 1874.]

Foreign judgment—39 Cal. 646.

Certificate—sec. 1923.

§ 1907. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof—

1. That the copy offered has been compared by the legal keeper of the record with the original, and is an exact transcript of the whole of it;

2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

§ 1908. The effect of a judgment or final order in an action or special proceeding before a court or judge

State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person;

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice actual or constructive, of the pendency of the action or proceeding. [In effect July 1st, 1874.]

ESTOPPEL BY RECORD.

Judgment—or order: *Finality*, defined, 33 Cal. 474; required, 24 Cal. 466; 37 Cal. 236; where action dismissed, 21 Cal. 164; where appeal taken, 13 Cal. 634; what not *res adjudicata*, 44 Cal. 635. *Estoppel*, generally, 31 Cal. 148; 32 Cal. 176; 35 Cal. 231; 37 Cal. 236; 51 Cal. 368; must be pleaded or proven, sec. 1963, subd. 6; 23 Cal. 354; 24 Cal. 78; 30 Cal. 630; 36 Cal. 626; 47 Cal. 21; waiver of, 42 Cal. 619; records of Board of Supervisors, 47 Cal. 47; in equity suit, 39 Cal. 482; 48 Cal. 386; dismissal by consent is bar, 47 Cal. 542.

Jurisdiction—generally, see sec. 33*n*, sec. 1917; impeaching judicial record for want of, sec. 1916; presumed on collateral attack, sec. 412*n*; 5 Cal. 64; 7 Cal. 279; 12 Cal. 133, 275; 14 Cal. 668; 16 Cal. 72, 339; 23 Cal. 101; 24 Cal. 190; 33 Cal. 683; 34 Cal. 391, 615; 35 Cal. 528; 37 Cal. 458; 39 Cal. 439; 41 Cal. 82; 44 Cal. 623; 45 Cal. 455, 543; 46 Cal. 656; 49 Cal. 208, 233, 374; 50 Cal. 203; 51 Cal. 615; *Linehan v. Hathaway*, March 3d, 1830, 5 Pac. C. L. J. 90; but see 53 Cal. 635; otherwise of inferior Courts, 12 Cal. 286; 23 Cal. 404; 34 Cal. 326; but see 52 Cal. 171.

SUBDIVISION 1. Probate or administration—collateral attack on proceedings, 4 Cal. 313; 18 Cal. 480, 503; 20 Cal. 273; 28 Cal. 182; 33 Cal. 46; conclusiveness of proceedings, sec. 1333; 6 Cal. 669; 18 Cal. 430; 23 Cal. 363; 25 Cal. 223; 29 Cal. 521; 32 Cal. 120; 44 Cal. 370; 45 Cal. 95; 48 Cal. 366; 53 Cal. 680. **Legal condition of person—insolvent**, 34 Cal. 18; 40 Cal. 425; estoppel, by not making defense in ejectment, 43 Cal. 210. **Title settled by judgment—ejectment in**, 14 Cal. 468, 545; 18 Cal. 111; 26 Cal. 126; 27 Cal. 168; 28 Cal. 156; 30 Cal. 309, 634; 32 Cal. 176; 37 Cal. 339; 41 Cal. 42; 45 Cal. 231, 593; 48 Cal. 601; 49 Cal. 325; 50 Cal. 171; forcible entry and detainer, in, 23 Cal. 381; 30 Cal. 634; foreclosure of, 14 Cal. 634; 24 Cal. 603; 37 Cal. 236; and see 53 Cal. 657; generally, 31 Cal. 148; 32 Cal. 197; 37 Cal. 396; 38 Cal. 262, 586; 40 Cal. 282; 47 Cal. 461; 49 Cal. 525; 51 Cal. 505; land department of, see *Mexican grant*, and 52 Cal. 424; *Mexican grant*, as to, 14 Cal. 545; 27 Cal. 168; 32 Cal. 365; 33 Cal. 448; 49 Cal. 325, 473; partner, against, 49 Cal. 124; quieting title, 23 Cal. 409; replevin in, 10 Cal. 520; riparian rights, determining, 53 Cal. 469; subsequent title not affected, 26 Cal. 513; 32 Cal. 109; 35 Cal. 316; trespass by partners, 14 Cal. 223; trespass *quare clausum fregit*, 43 Cal. 65; where *lis pendens* filed, 23 Cal. 335; 25 Cal. 194.

SUBDIVISION 2. Matter directly adjudged—extent of estoppel on, definition, sec. 1911; demurrer, judgment on, 5 Cal. 430; 47 Cal. 32; gen-

erally, 23 Cal. 373; 30 Cal. 309; 36 Cal. 231: issues tried, *Hmit* et al. Cal. 28; 33 Cal. 647; merits not passed on, 25 Cal. 272; 43 Cal. 5128: misjoinder, where, 27 Cal. 287: motion to set aside judgment when no bar, 45 Cal. 617: questions involved, determine estoppel, Cal. 311: recital in judgment, 44 Cal. 623: same cause of action, 372; *Ladd v. Durkin*, March 18th, 1880, 5 Pac. C. L. J. 136; *Doyle v. Newhall*, May 15th, 1880, 5 Pac. C. L. J. 413: serious offense conviction of, 10 Cal. 391: stipulation, where, 43 Cal. 485; 44 Cal. 294: judgment against, when landlord not barred by, *Doyle*, etc., March 17th, 1880, 5 Pac. C. L. J. 136: verdict, estoppel, Cal. 81; 7 Cal. 232; 15 Cal. 145, 182, 425; 20 Cal. 448, 486; 41 Cal. 294. Parties and privies—sec. 1910: alone estopped, 9 Cal. 1207; 23 Cal. 354; 30 Cal. 229; 40 Cal. 249: application to particular, 12 Cal. 140; 24 Cal. 502; 34 Cal. 62; 39 Cal. 234; 44 Cal. 46; 45 Cal. 386; 49 Cal. 213, 243; 50 Cal. 172, 655; 51 Cal. 478; *Altschul*, etc., March 17th, 1880, 5 Pac. C. L. J. 136. Estoppels in various cases, counter-claim barred by not pleading, sec. 439: fictitious names used, 50 Cal. 205, 585: partition, conclusiveness of judgment in, 53 Cal. 362: Probate Court decree, see JUDGMENT, note *supra* v. *Splivalo*, Feb. 26th, 1880; *Reynolds v. Brumagim*, March 4th, 1880, 5 Pac. C. L. J. 115: sureties, sec. 1912.

§ 1909. Other judicial orders of a court or of a justice of this State, or of the United States, create a dispositive presumption, according to the matter directly determined between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating the same thing under the same title and in the same case.

Disputable presumptions—see sec. 1963 and notes.

Parties and privies—see sec. 1908, subd. 2n, sec. 1910.

§ 1910. The parties are deemed to be the same in a case as those between whom the evidence is offered were litigating on opposite sides in the former case, and a judgment or determination could in that case have been made by the parties alone, though other parties were joined with them or either.

Other parties—49 Cal. 213.

§ 1911. That only is deemed to have been adjudicated in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

See matter directly adjudged—note to sec. 1908, subd. 2.

§ 1912. Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to defend the defense.

Suit by surety against principal—16 Cal. 69.

§ 1913. The effect of a judicial record of a sister State is the same in this State as in the State where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.

Judgment obtained in another State—by publication of summons, 8 Cal. 449.

§ 1914. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

§ 1915. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing;

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

§ 1916. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

Judicial record, impeaching—not for error, 32 Cal. 176; by infant, 31 Cal. 273; by showing alteration, 50 Cal. 448; by collateral attack, 49 Cal. 208; for want of jurisdiction, see sec. 1917 and note; 7 Cal. 54, 443; 8 Cal. 562; 27 Cal. 300; 30 Cal. 439.

§ 1917. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.

Jurisdiction—generally, see note to sec. 33; also sec. 1908 and note; of defendant sued by fictitious name, 50 Cal. 203; of court not of record, on collateral attack, 52 Cal. 171.

§ 1918. Other official documents may be proved as follows:

1. Acts of the executive of this State, by the records of the State Department of the State; and of the United States, by the records of the State Department of the United States, certified by the heads of those departments respectively. They may also be proved by public docu-

ments printed by the order of the Legislature, or either house thereof;

2. The proceedings of the Legislature of this State, or of either house thereof, by the journals of those bodies respectively, or by published statutes or resolutions, or by copies certified by the clerk or by their order;

3. The acts of the executive, or the proceedings of the legislature of a sister State, in the same manner as above;

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals printed by their authority, or commonly received in that country, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof by a public act of the executive of the United States;

5. Acts of a municipal corporation of this State, by a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation;

6. Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof;

7. Documents of any other class in a sister State, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original;

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal of the country or sovereign, that the document is a valid and sufficient document of such country, and that the copy is duly certified by the officer having the legal custody of the original;

9. Documents in the departments of the United States government, by the certificate of the legal keeper thereof. [In effect July 1st, 1874.]

OFFICIAL DOCUMENTS.

SUBDIVISION 5. Municipal corporation—48 Cal. 143.

SUBDIVISION 6. Certified copy—of documents in this State: of land grants, 21 Cal. 202; certificate, sec. 1923; street assessment certificate to record, 44 Cal. 213; swamp land papers, 52 Cal. 171.

SUBDIVISION 7. Documents in another State—scope of "sister State," sec. 1924; in land department of United States, 544; 18 Cal. 416; 19 Cal. 87; 40 Cal. 358.

§ 1919. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

Public record of a private writing—certified copy of: alcalde grants, 31 Cal. 500; deed, 49 Cal. 212; expediente of Mexican grant, 51 Cal. 590; patent, 50 Cal. 346; power of attorney, 51 Cal. 198; railroads, articles of consolidation, 50 Cal. 346.

§ 1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts stated therein. [In effect July 1st, 1874.]

Official documents—proof of, sec. 1918.

Entries in performance of public duty—6 Cal. 674; 31 Cal. 140, 500; 35 Cal. 521; by officer or board of officers, etc., sec. 1926.

§ 1921. A transcript from the record or docket of a justice of the peace of a sister State, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

§ 1922. There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

§ 1923. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court. [In effect July 1st, 1874.]

§ 1924. The provisions of the preceding section of this article applicable to the public writings of a state are equally applicable to the public writings of the States or a Territory of the United States. [In effect July 1st, 1874.]

§ 1925. A certificate of purchase or of location of lands in this State, issued or made in pursuance of the law of the United States or of this State, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this presumption may be overcome by proof that at the time of the certificate, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or that the holder thereof claims, or that the adverse party is holding the land for mining purposes.

Certificate of purchase—adverse possession, defendant's interest, 50 Cal. 412; annulment of, 50 Cal. 84; 51 Cal. 128; effect of, 51 Cal. 521; evidence against, 50 Cal. 211; evidence as, 48 Cal. 505; mortgagee, where junior, 53 Cal. 649; premature, Polnam, April 23rd, 1880, 5 Pac. C. L. J. 423; prima facie title, 195; 52 Cal. 244; proof of existence, and of preliminary steps, 169; requisites, 51 Cal. 128; scope of, 52 Cal. 521; suspension of, 461; 52 Cal. 521.

§ 1926. An entry made by an officer, or board of commissioners, or under the direction and in the presence of the board, in the course of official duty, is prima facie evidence of the facts stated in such entry. [In effect July 1st, 1874.]

Board—of commissioners, report as evidence, 49 Cal. 229

ARTICLE III.

PRIVATE WRITINGS.

- 1929. Private writings classified.
- 1930. Seal defined.
- 1931. Manner of making it.
- 1932. Effect of a seal.
- 1933. Execution of an instrument defined.
- 1934. Compromise of a debt without seal good.
- 1935. Subscribing witness defined.
- 1936. Books, maps, etc., how far evidence.
- 1937. Original writing to be produced or accounted for.
- 1938. When in possession of adverse party, notice to be given.
- 1939. Writings called for and inspected may be withdrawn.
- 1940. Where there is a subscribing witness, the proof.
- 1941. Other witnesses may also testify.
- 1942. When evidence of execution not necessary.
- 1943. Evidence of handwriting.
- 1944. Allowed by comparison.
- 1945. Same.
- 1946. Entries of decedent's evidence in specified cases.

- § 1947. Copies of entries also allowed.
- § 1948. Private writings acknowledged and certified
- § 1949. County clerks to keep private papers deposited
- § 1950. Public records not to be carried about.

§ 1929. Private writings are either—

1. Sealed; or,
2. Unsealed.

No distinction—between sealed and unsealed writings, sec. 1932.

§ 1930. A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument. Seal generally—sec. 14 and notes: requisite, sec. 1931.

§ 1931. A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the croll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister State or foreign country, and there recognized as a seal, must be so regarded in this State. [In effect July 1st, 1874.]

Scope of word "seal"—sec. 14.

Impression of seal—Civil Code, sec. 1628; 5 Cal. 220, 315.

Seal of corporation—22 Cal. 156; 52 Cal. 192.

Seals of courts—secs. 147-153.

§ 1932. There shall be no difference hereafter, in this State, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal. [In effect July 1st, 1874.]

Corresponding provision—see Civil Code, sec. 1629.

Before distinction abolished—13 Cal. 220, 510; 15 Cal. 363; 16 Cal. 5; impeaching consideration of sealed instrument, 6 Cal. 134, 664; 16 Cal. 461; 12 Cal. 286; 13 Cal. 30; 14 Cal. 19.

Agreement of composition—requires no seal, sec. 1934.

Under Mexican system—no distinction, sec. 147.

§ 1933. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

Execution of instrument—subscribing, 28 Cal. 157; 29 Cal. 352; 49 Cal. 192; 51 Cal. 404, 473; delivering, 5 Cal. 319; 13 Cal. 502; 51 Cal. 573; Effect of seal, before distinction abolished, 16 Cal. 594.

§ 1934. An agreement in writing without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

§ 1935. A subscribing witness is one who sees executed or hears it acknowledged, and at the time the party thereupon signs his name as a witness.

§ 1936. Historical works, books of science or published maps or charts, when made by persons different between the parties, are *prima facie* evidence of facts of general notoriety and interest. [In effect July 1st, 1874.]

Books—as aid to court, sec. 1875; as evidence, sec. 1900: proof as to, sec. 1963, subds. 35, 36.

§ 1937. The original writing must be produced, except as provided in sections eighteen hundred and fifty-five and nineteen hundred and ninety-five. If the original has been lost, proof of the loss must first be made, and evidence can be given of its contents. Upon satisfactory proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or a recital of its contents in some authentic document, or the recollection of a witness, as provided in sections eighteen hundred and fifty-five.

Evidence of contents of instrument—lost deed, 49 Cal. 427; 49 Cal. 653.

§ 1938. If the writing be in the custody of the party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is in the possession, notice, or where it has been wrongfully obtained from the party held by the adverse party.

Document in possession—of opponent, sec. 1855, subd. 1.

§ 1939. Though a writing called for by one party is not produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it in evidence in the case.

§ 1940. Any writing may be proved either:
 1. By any one who saw the writing executed;
 2. By evidence of the genuineness of the handwriting of the maker; or,

3. By a subscribing witness. [In effect July 1st, 1874.]

Proof of execution of writing—by admission, sec. 1942.

SUBDIVISION 2. Proof of handwriting—secs. 1943.

SUBDIVISION 3. Subscribing witness—sec. 1935; 3 Cal. 306, 426; 14 Cal. 18; 26 Cal. 393; 27 Cal. 233; other evidence of genuineness, when admissible, sec. 1941; on contest of will, sec. 1315.

§ 1941. If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

§ 1942. Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in section nineteen hundred and forty-five, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

§ 1943. The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

Comparison of handwriting—47 Cal. 294: experts, 50 Cal. 462.

§ 1944. Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge. [In effect July 1st, 1874.]

§ 1945. Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

Presumption—that ancient writing is genuine, sec. 1963, subd. 34.

§ 1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as *prima facie* evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it;
2. When it was made in a professional capacity, and in the ordinary course of professional conduct;
3. When it was made in the performance of a duty specially enjoined by law. [In effect July 1st, 1874.]

Entries in books—repeated, sec. 1947: as evidence in favor of party making them, 2 Cal. 172; 7 Cal. 186; 14 Cal. 573; 17 Cal. 58, 466: of alleged partnership, 23 Cal. 511; 49 Cal. 105: where alteration, sec. 1982: 17 Cal. 324.

§ 1947. When an entry is repeated in the regular course of business, one being copied from another at or

near the time of the transaction, all the entries are equally regarded as originals.

Entry copied—from slate, 14 Cal. 573.

§ 1948. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment of conveyances of real property, and the certificate of acknowledgment or proof is *prima facie* evidence of the execution of the writing in the same manner as if it were a conveyance of real property. [In effect July 1st, 1874.]
 Conveyance of real property—as evidence, sec. 1951.

§ 1949 of said Code is repealed. [In effect July 1st, 1874.]

§ 1950. The record of a conveyance of real property or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, in cases where the inspection of the record is shown to be essential to a just determination of the cause or proceeding pending there, where the court is held in the same building with the office. [In effect July 1st, 1874.]

§ 1951. Every instrument conveying or affecting real property, acknowledged, or proved and certified, in the manner provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in any action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved may also be read in evidence, with the like effect as the original, on proof by affidavit, or otherwise, that the original is not in the possession or under the control of the party producing the certified copy. [In effect July 1st, 1874.]

Certified copies of conveyances—when admissible, 25 Cal. 50, 238; 38 Cal. 216, 449.

CHAPTER IV.

MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

§ 1954. Material objects.

§ 1954. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, or character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

Material objects—blood-spots provable by witnesses, 49 Cal. 485.

CHAPTER V.

INDIRECT EVIDENCE, INFERENCES, AND PRESUMPTIONS.

§ 1957. Indirect evidence classified.

§ 1958. Inference defined.

§ 1959. Presumption defined.

§ 1960. When an inference arises.

§ 1961. Presumptions may be controverted, when.

§ 1962. Specification of conclusive presumptions.

§ 1963. All other presumptions may be controverted.

§ 1957. Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

§ 1958. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

§ 1959. A presumption is a deduction which the law expressly directs to be made from particular facts.

§ 1960. An inference must be founded—

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

§ 1961. A presumption (unless declared by law to be conclusive) may be controverted by other evidence direct or indirect; but unless so controverted, the jury are bound to find according to the presumption.

§ 1962. The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the proof of the commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the proof of a written instrument between the parties thereto, and of the successors in interest by a subsequent title; but this does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabiting with her husband who is not impotent, is indisputably presumed legitimate.

6. The judgment or order of a court, when declared by this Code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, has been expressly made conclusive.

ESTOPPEL.

SUBDIVISION 1. Malicious intent—in libel, 47 Cal. 252.

SUBDIVISION 2. Recitals—in written instruments, bill of exchange, 6 Cal. 134; 13 Cal. 47; 23 Cal. 472; 26 Cal. 79, 455; 27 Cal. 119; 30 Cal. 11; 36 Cal. 36, 610; 48 Cal. 634; but see 31 Cal. 471; 36 Cal. 469; *Main v. Hilton*, 1880, 4 Pac. C. L. J. 506; conflicting patents, 34 Cal. 506; 44 Cal. 257; deeds in, 3 Cal. 263; 6 Cal. 149; 12 Cal. 20, 315; 14 Cal. 612; 22 Cal. 28 Cal. 175; 30 Cal. 560; 50 Cal. 503; and see quitclaim deeds: estate purchase on, 22 Cal. 224; 31 Cal. 591; fraud in deed, patent, estoppel, 665; 21 Cal. 220; 44 Cal. 563; grantee may deny grantor's title, doctrine, 13 Cal. 494; 14 Cal. 472; 16 Cal. 100; 18 Cal. 465; insurance, acknowledgment of premium, Civil Code, sec. 2598; limitation, 6 Cal. 149; 13 Cal. 477; and see consideration: grant, impeaching, 48 Cal. 339; mortgage as, 48 Cal. 572; mortgage fee, estoppel of, 13 Cal. 538; 31 Cal. 457; municipality, deed of, 257; parties and privies, alone estopped, 16 Cal. 100; 36 Cal. 505; 49 Cal. 213, 331; and see conflicting patents, fraud, State patent, States patent: pleadings, supplementary, in, 48 Cal. 346; preclaimant, 50 Cal. 196; quit-claim deeds, 14 Cal. 472; 18 Cal. 465

244; 33 Cal. 288; 38 Cal. 90; 41 Cal. 63; 42 Cal. 175; 44 Cal. 330, 353; 50 Cal. 52; State patent, 28 Cal. 100; 31 Cal. 461; 34 Cal. 590; 47 Cal. 181; 50 Cal. 143; street contract in, 52 Cal. 270; tax deeds in, 53 Cal. 213; United States patent, 14 Cal. 467; 15 Cal. 366; 16 Cal. 229, 324; 17 Cal. 225, 259; 20 Cal. 150, 412; 22 Cal. 111, 480; 29 Cal. 311; 45 Cal. 538; 48 Cal. 345; 49 Cal. 334.

SUBDIVISION 3. Estoppel in pais—absent, when, 3 Cal. 400; 6 Cal. 263, 531; 10 Cal. 90, 172, 589; 13 Cal. 494; 17 Cal. 401; 22 Cal. 468; 24 Cal. 268; 25 Cal. 147; 26 Cal. 23; 28 Cal. 175; 31 Cal. 218; 36 Cal. 535; 37 Cal. 40; 38 Cal. 119, 300, 428; 40 Cal. 429; 43 Cal. 526, 597; acquiescence, generally, 49 Cal. 314; 50 Cal. 438; 51 Cal. 275; *Salter v. Baker*, Feb. 6th, 1880, 4 Pac. C. L. J. 543; acquiescence in location of division fence, 9 Cal. 600; 25 Cal. 619; 48 Cal. 395; 50 Cal. 295; 51 Cal. 362; agreed survey, when none by, 52 Cal. 442; certiorari on, 47 Cal. 222; certificate of purchase by, 52 Cal. 244; corporation of, 50 Cal. 353; deception, liability for, Civil Code, sec. 1709; 2 Cal. 270, 491; 4 Cal. 300; 8 Cal. 117; 14 Cal. 367; 26 Cal. 40; 31 Cal. 153, 218; *Fishbeck v. Phoenix Ins. Co.*, March 24th, 1880, 5 Pac. C. L. J. 212; dedication of streets, 22 Cal. 488; 35 Cal. 490; defendant, additional, as to, 50 Cal. 258; equitable, 10 Cal. 158; 19 Cal. 660; 24 Cal. 114, 127; 25 Cal. 596; 44 Cal. 162; exists, when, 2 Cal. 489; 3 Cal. 302; 4 Cal. 97, 300; 5 Cal. 84, 366; 6 Cal. 607; 7 Cal. 551; 8 Cal. 27, 77, 113, 303, 461; 9 Cal. 204, 600; 10 Cal. 172; 12 Cal. 148; 13 Cal. 359; 14 Cal. 279; 16 Cal. 345, 591; 23 Cal. 11; 24 Cal. 268; 25 Cal. 545, 593; 26 Cal. 23; 30 Cal. 408; 31 Cal. 148; 36 Cal. 94; 38 Cal. 300; guardian of, 32 Cal. 119; partnership, as to books of, 49 Cal. 105; pleadings, by, 12 Cal. 191; 27 Cal. 228; 30 Cal. 360; 37 Cal. 34; 49 Cal. 414; pledgor of, 30 Cal. 377; receptor of, 10 Cal. 172; 45 Cal. 223; silence as, 10 Cal. 631, and see ACQUIESCENCE; stipulation by, 51 Cal. 629; 53 Cal. 680; subsequent purchaser, when none for, 52 Cal. 579; waiver, where, 22 Cal. 580; 53 Cal. 135.

SUBDIVISION 4. Tenant's denial of landlord's title—rule against, 2 Cal. 558; 6 Cal. 197; 8 Cal. 398, 581; 9 Cal. 575; 11 Cal. 133; 12 Cal. 290; 16 Cal. 89; 27 Cal. 105; 44 Cal. 515; 47 Cal. 474; 50 Cal. 250; exceptions, 21 Cal. 309; 29 Cal. 168; 30 Cal. 201; 33 Cal. 237; 35 Cal. 558; justification, see EXCEPTIONS, and 34 Cal. 265; 36 Cal. 307; 37 Cal. 389; 38 Cal. 262; 44 Cal. 508; 45 Cal. 594; 47 Cal. 459, 474; 49 Cal. 202; proof of relation, 30 Cal. 544; rule inapplicable, 38 Cal. 122.

SUBDIVISION 5. Legitimacy of issue—compare sec. 1963, subd. 31.

SUBDIVISION 6. Judgment or order—when conclusive, see sec. 1908; 14 Cal. 634; 23 Cal. 354, 373; 27 Cal. 228; 30 Cal. 229, 301, 309, 360, 630; 31 Cal. 148; 32 Cal. 176; 33 Cal. 74, 449; 34 Cal. 265; 36 Cal. 28, 230, 489; 37 Cal. 236, 389; 38 Cal. 250, 590; 39 Cal. 473; 40 Cal. 246, 281, 294; 41 Cal. 221, 232, 298; 42 Cal. 368; 43 Cal. 86, 210, 306; 44 Cal. 292; 45 Cal. 128, 439, 485.

SUBDIVISION 7. Other estoppels—alcalde grant, as to, 1 Cal. 295; conclusive evidence, generally, sec. 1978; 45 Cal. 644; infants, none against, 25 Cal. 153; notice in probate matters, secs. 1376, 1638; probate of will, sec. 1333; survey, governmental, when by, 49 Cal. 473.

§ 1963. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong.
2. That an unlawful act was done with an unlawful intent.
3. That a person intends the ordinary consequence of his voluntary act.

4. That a person takes ordinary care of his concerns

5. That evidence willfully suppressed would be as if produced.

6. That higher evidence would be adverse from being produced.

7. That money paid by one to another was due latter.

8. That a thing delivered by one to another belongs to the latter.

9. That an obligation delivered up to the debtor has been paid.

10. That former rent or installments have been paid when a receipt for latter is produced.

11. That things which a person possesses are owned by him.

12. That a person is the owner of property from exercising acts of ownership over it, or from common knowledge of his ownership.

13. That a person in possession of an order on a bank for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly.

14. That a person acting in a public office was lawfully appointed to it.

15. That official duty has been regularly performed.

16. That a court or judge, acting as such, whether in a State or any other State or country, was acting in the lawful exercise of his jurisdiction.

17. That a judicial record, when not conclusively established, still correctly determine or set forth the rights of parties.

18. That all matters within an issue were laid before a jury and passed upon by them; and in like manner that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them.

19. That private transactions have been fair and reasonable.

20. That the ordinary course of business has been followed.

21. That a promissory note or bill of exchange has been given or indorsed for a sufficient consideration.

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and in the regular course of making the note or bill.

23. That a writing is truly dated.

24. That a letter duly directed and mailed was received in the regular course of the mail.

25. Identity of person from identity of name.

26. That a person not heard from in seven years is dead.
27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.
28. That things have happened according to the ordinary course of nature and the ordinary habits of life.
29. That persons acting as copartners have entered into contract of copartnership.
30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.
31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.
32. That a thing once proved to exist continues as long as is usual with things of that nature.
33. That the law has been obeyed.
34. That a document or writing more than thirty years old, is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.
35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published.
36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published, contains correct reports of such cases.
37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest.
38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.
39. That there was a good and sufficient consideration for a written contract.
40. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:
First.—If both of those who have perished were under the age of fifteen years, the older is presumed to have survived.

Second.—If both were above the age of sixty, the is presumed to have survived.

Third.—If one be under fifteen and the other sixty, the former is presumed to have survived.

Fourth.—If both be over fifteen and under sixty, the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older.

Fifth.—If one be under fifteen or over sixty, other between those ages, the latter is presumed to have survived.

Presumptions—when raised, 21 Cal. 456: of knowledge of fact, 50 Cal. 337: rebutting, 52 Cal. 650: where two equally reasonable, 630.

DISPUTABLE PRESUMPTIONS.

SUBDIVISION 1. Innocence—of crime or wrong, evidence to overcome, see sec. 2061, subd. 5.

SUBDIVISION 6. Higher evidence adverse—see sec. 2061.

SUBDIVISION 8. Thing delivered, etc.—deed, 49 Cal. 374.

SUBDIVISION 11. Title from possession—presumption of property, 4 Cal. 33, 67, 79, 94, 278, 308; 5 Cal. 42, 87, 250, 486; 6 Cal. 173, 649; 7 Cal. 152, 262; 8 Cal. 143, 323, 467, 603; 9 Cal. 1, 63, 427, 181, 230, 233; 11 Cal. 153; 12 Cal. 291, 560; 13 Cal. 38, 166, 562; 143; 17 Cal. 43, 107, 271; 18 Cal. 199; 19 Cal. 625; 20 Cal. 209; 21 Cal. 324, 381, 423, 453, 610; 23 Cal. 221, 576; 24 Cal. 279; 25 Cal. 25, 509, 510; 28 Cal. 202; 29 Cal. 206, 490; 30 Cal. 355, 408; 31 Cal. 183, 418; 32 Cal. 668; 36 Cal. 271, 333; 37 Cal. 101; 43 Cal. 371, 485; 44 Cal. 516, 517, 101, 281; 49 Cal. 523. *Personal property*, 2 Cal. 370; 5 Cal. 460; 9 Cal. 246; 19 Cal. 64; 31 Cal. 649. *Possession requisite*, what constitutes, by, 23 Cal. 247, 376: ejectment, in, 13 Cal. 592; 45 Cal. 91: see REAL PROPERTY, *supra*; servant by, 8 Cal. 617: tenant by, 91: timber, of, 12 Cal. 316.

SUBDIVISION 14. Officer deemed regularly appointed—5 Cal. 339; 6 Cal. 215; 16 Cal. 552; 24 Cal. 121; 53 Cal. 29.

SUBDIVISIONS 15 and 16. Regular performance of official or judicial duty—1 Cal. 323; 3 Cal. 27, 192; 5 Cal. 53; 6 Cal. 81; 9 Cal. 227; 21 Cal. 291; 28 Cal. 133; 47 Cal. 43, 222, 294; 48 Cal. 1, 49 Cal. 229, 679; 50 Cal. 360; 51 Cal. 55, 146, 298, 447; 52 Cal. 171, 172, Cal. 239, 420; *Dougherty v. Harrison*, March 5th, 1880, 5 Pac. 100; *La Soc. Française, etc. v. Beard*, March 31st, 1880, 5 Pac. C. 1.

SUBDIVISION 16. Jurisdiction—sec. 33n.

SUBDIVISION 17. Judicial record correct—48 Cal. 133, 229; 51 Cal. 219, 298, 447; 52 Cal. 338, 664; 53 Cal. 239, 635.

SUBDIVISION 20. Ordinary course of business followed—1960, subd. 2; 47 Cal. 294.

SUBDIVISION 21. Promissory note, etc., imports consideration—see subd. 3 of this section, and Civil Code, secs. 1614, 1615; 10 Cal. 461; 34 Cal. 138.

SUBDIVISION 23. Writing truly dated—deed, 47 Cal. 171.

SUBDIVISION 25. Identity—1 Cal. 428; 16 Cal. 554; 25 Cal. 218, 219; 29 Cal. 514; 46 Cal. 49.

SUBDIVISION 26. Death of person—not heard from in suit, 8 Cal. 62; 38 Cal. 223.

SUBDIVISION 29. Copartners—29 Cal. 257; 49 Cal. 344.

SUBDIVISION 30. Marriage—Civil Code, secs. 68-78; 10 Cal. 537; 26 Cal. 132; 47 Cal. 621; 52 Cal. 568.

SUBDIVISION 31. Legitimacy—13 Cal. 101.

SUBDIVISION 33. Law obeyed—51 Cal. 210.

SUBDIVISION 36. Foreign laws—21 Cal. 226; 32 Cal. 60.

SUBDIVISION 39. Consideration of contract—see subd. 21, note.

PRESUMPTIONS IN VARIOUS CASES.

Adultery—41 Cal. 107. Ancient writing—when deemed genuine, sec. 1963, subd. 34. Authenticity of book—when presumed, sec. 1963, subd. 35. Burial ground—dedication to public, sec. 1963, subd. 38. Check—45 Cal. 419. Community property—12 Cal. 251. Conclusive presumptions—sec. 1962 and notes. Continuance—of existing thing, sec. 1963, subd. 32. Contract—consideration for, sec. 1963, subd. 39. Conveyance of executor, etc.—sec. 1601. Date—of writing, correct, sec. 1963, subd. 23 and note: of indorsement, see that head. Disputable presumptions—sec. 1963, and note *supra*. Entire issue, etc.—submitted, sec. 1963, subd. 18. Evidence suppressed—would be adverse, sec. 1963, subd. 5. Execution of—conveyance, sec. 1963, subd. 37. Fire department records—Political Code, sec. 3341. Foreign laws—embodied in reports, sec. 1963, subd. 36 and note. Higher evidence—adverse, sec. 1963, subd. 6. Identity—of person from name, sec. 1963, subd. 25 and note. Indorsement—of negotiable paper, deemed made at date, sec. 1963, subd. 22. Innocence—sec. 1963, subd. 1. Jurisdiction—presumed, sec. 1963, subd. 16. Law obeyed—sec. 1963, subd. 33. Legitimacy—sec. 1963, subd. 31 and note. Letters received—in regular course of mail, sec. 1963, subd. 24. Militia fine—Political Code, sec. 1935. Money—paid, was due, sec. 1963, subd. 7: in county treasury, 31 Cal. 74. Negligence—25 Cal. 467; 28 Cal. 627; 44 Cal. 83. Notary's protest—Political Code, sec. 795. Obligation delivered back—has been paid, sec. 1963, subd. 9. Officer regularly appointed—sec. 1963, subd. 14 and note. Official and judicial duty regularly performed—sec. 1963, subds. 15, 16, and notes. Ordinary care—taken, sec. 1963, subd. 4. Ordinary consequences—intended, sec. 1963, subd. 3. Ordinary course of business—followed, sec. 1963, subd. 20 and note. Ordinary course of nature, etc.—sec. 1963, subd. 28. Ownership—whence presumed, sec. 1963, subd. 12: from possession, sec. 1963, subd. 11 and note. Partnership—whence presumed, sec. 1963, subd. 29 and note: special, Civil Code, sec. 2484: use of fictitious names in, Civil Code, secs. 2466-2471. Person not heard from—in seven years, deemed dead, sec. 1963, subd. 26 and note. Possession imports ownership—sec. 1963, subd. 11 and note. Possessor of order on himself—sec. 1963, subd. 26 and note. Private transactions—deemed regular, sec. 1963, subd. 19. Probate Court order—for disclosure of property, sec. 1460. Promissory note, etc.—imports consideration, sec. 1963, subd. 21 and note. Receipt—later, imports previous payments, sec. 1963, subd. 10: only *prima facie* evidence, 49 Cal. 635. Record—judicial deemed correct, sec. 1963, subd. 17. Short-hand notes—sec. 273. Stock—sale for assessments, Civil Code, sec. 348. Surveys—Political Code, sec. 3973. Surviving calamity—sec. 1963, subd. 40. Thing delivered—to owner, sec. 1963, subd. 8 and note. Unlawful intent—sec. 1963, subd. 2.

CHAPTER VI.
INDISPENSABLE EVIDENCE.

- § 1967. Indispensable evidence, what.
- § 1968. To prove usage, perjury, and treason, more than one required.
- § 1969. Will to be in writing.
- § 1970. How revoked.
- § 1971. Transfer of real property to be in writing.
- § 1972. Last section not to extend to certain cases.
- § 1973. Agreement not in writing, when invalid.
- § 1974. Representation of credit by writing.

§ 1967. The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts.

§ 1968. Perjury and treason must be proved by the testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

Two witnesses—for probate of lost will, sec. 1339.

§ 1969. A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, in such a case, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be shown. [In effect July 1st, 1874.]

Lost or destroyed will—probate of, secs. 1338-1341.

§ 1970. A written will cannot be revoked or altered otherwise than as provided in the Civil Code. [In effect July 1st, 1874.]

Revocation or alteration of will—see Civil Code, sec. 1292.

§ 1971. No estate or interest in real property can be created for leases for a term not exceeding one year, nor a trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or by a conveyance, or other instrument in writing, subscribed and sealed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

Scope of section—application restricted by, sec. 1972.

Corresponding provision—Civil Code, sec. 1091.

Real property—estate, interest, etc., in, compare sec. 1973, subd. 5: bill of sale insufficient, 52 Cal. 191: mortgage lien can only be created by writing, 53 Cal. 677.

Trust—Civil Code, sec. 852; 6 Cal. 154.

§ 1972. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

Trusts—Implied, 21 Cal. 92; 22 Cal. 575; 27 Cal. 119; 35 Cal. 481; 36 Cal. 94.

Part performance—enforcing verbal contract after, 1 Cal. 119, 207; 10 Cal. 150; 19 Cal. 447; 24 Cal. 142; 35 Cal. 646; 39 Cal. 109; 44 Cal. 595; 43 Cal. 194: executed parol agreement to convey land, not within statute, 52 Cal. 561.

§ 1973. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of the Civil Code;

3. An agreement made upon consideration of marriage, other than a mutual promise to marry;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase-money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Corresponding provision—see Civil Code, sec. 1624.

Note or memorandum—language and sufficiency of, 21 Cal. 250; by auctioneer, sec. 1973, subd. 4, and note.

SUBDIVISION 1. Agreement not to be performed with cases within Statute of Frauds, 43 Cal. 509; 46 Cal. 266; not written, 49 Cal. 274; parol partnership, part performance, 47 Cal. 142.

SUBDIVISION 2. Guaranty—corresponding provision, Civil Code, sec. 2793; exception, Civil Code, sec. 2794; executor by, sec. 1624; the statute, 2 Cal. 156; 9 Cal. 323; 12 Cal. 286, 542; 29 Cal. 604; otherwise, 5 Cal. 285; 6 Cal. 102; 7 Cal. 32; 12 Cal. 311; 18 Cal. 618; 187; 27 Cal. 80; 29 Cal. 150; 33 Cal. 121; 34 Cal. 673; 38 Cal. 133; consideration for forbearance, 2 Cal. 460; 50 Cal. 255; of part, note, 2 Cal. 485.

SUBDIVISION 4. Agreement for sale of goods, etc.—acceptance, 21 Cal. 415; also, Civil Code, sec. 1798, Political Code, sec. 3292; corresponding provision, Civil Code, sec. 1739, and see Civil Code, sec. 1740; contract in writing, when presumed, 1 Cal. 181; 6 Cal. 140; 8 Cal. 614; 14 Cal. 384; 19 Cal. 393; 22 Cal. 103, 539; 23 Cal. 639; 52 Cal. 561; growing crops are not, 6 Cal. 664; 17 Cal. 634; insurance policy, fire, as collateral security, 30 Cal. 80; stocks bought on margin, 47 Cal. 142.

SUBDIVISION 5. Agreement as to real property—agent, 21 Cal. 389; 30 Cal. 360; 47 Cal. 213; auction sale, when written, 75; before statute enacted, 1 Cal. 98; corresponding provision, Civil Code, sec. 1741; court, sale by, not within statute, 9 Cal. 181; parol agreement to convey lands, not within statute, 4 Cal. 363; 52 Cal. 561; growing crops, not within statute, 23 Cal. 634; lease for more than year, 2 Cal. 603; Mexican law, parol agreement, 1 Cal. 119; 10 Cal. 17; 24 Cal. 222; 44 Cal. 331; 45 Cal. 58; claim, 14 Cal. 22; 20 Cal. 198; 23 Cal. 178; 30 Cal. 481; 51 Cal. 624; agreement not to oppose patent, void, 52 Cal. 624; part performance, sec. 1972 and note; promise, parol, to pay for improvement, 22 Cal. 489; purchase for another, 22 Cal. 575; 35 Cal. 488; right of action, Cal. 111; services in selling land, 37 Cal. 529; 38 Cal. 99; 40 Cal. 50; specific performance of verbal contract, 24 Cal. 171; trust, verbal, 21 Cal. 97; 35 Cal. 481; unwritten contract for sale of land, verbal, 50; verbal agreement to reconvey land, 48 Cal. 405; 50 Cal. 210; part, if entire contract invalid, 38 Cal. 99; writing need not be in writing, 51 Cal. 210.

§ 1974. No evidence is admissible to charge a party with a representation as to the credit of a third party unless such representation, or some memorandum or writing of, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

CHAPTER VII.

CONCLUSIVE OR UNANSWERABLE EVIDENCE.

§ 1978. Conclusive or unanswerable evidence.

§ 1978. No evidence is by law made conclusive or unanswerable, unless so declared by this Code.

Estoppel—secs. 1908, 1962.

TITLE III.

Of the Production of Evidence.

- CHAP. I.** By whom to be produced. §§ 1981-1982.
II. Means of production. §§ 1985-1997.
III. Manner of production. §§ 2002-2054.

CHAPTER I.
BY WHOM TO BE PRODUCED.

- § 1981. Evidence to be produced, by whom.
- § 1982. Writing altered, who to explain.

§ 1981. The party holding the affirmative of the issue must produce the evidence to prove it; therefore the burden of proof lies on the party who would be defeated if no evidence were given on either side.

Burden of proof—see under AFFIRMATIVE ALLEGATIONS: affirmative matter in answer, where, 8 Cal. 31; 15 Cal. 100; instrument in, 51 Cal. 55; insanity of, 47 Cal. 134; money paid under, 26 Cal. 606.

§ 1982. The party producing a writing as genuine which has been altered, or appears to have been altered after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another person without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or lawfully made, or that the alteration did not change the meaning or language of the instrument. If he does not, he may give the writing in evidence, but not otherwise.

Alteration—effect of, 50 Cal. 613; impeaching certificate for, 171; in indictment, 50 Cal. 447; need of accounting for, 26 Cal. 83; recently explained, 34 Cal. 564.

Printed form—erasure in, 32 Cal. 88; construction of, sec. 180.

CHAPTER II.
MEANS OF PRODUCTION.

- 1985. Subpœna for witness defined.
- 1986. Subpœna, how issued.
- 1987. Subpœna, how served.
- 1988. How, if witness be concealed.
- 1989. When a witness is compelled to attend.
- 1990. Person present compelled to testify.
- 1991. Disobedience, how punished.
- 1992. Forfeiture therefor.
- 1993. Warrant may issue to bring witness, when.
- 1994. Contents of warrant.
- 1995. If witness be a prisoner, how brought.
- 1996. On whose motion.
- 1997. How examined.

§ 1985. The process by which the attendance of a witness is required is a subpœna. It is a writ or order

rected to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

§ 1986. The subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending;

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it is issued by the judge, justice, or any other officer before whom the attendance is required;

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other State in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction; with like power to enforce attendance, and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein.

§ 1987. The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

§ 1988. If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing a subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

§ 1989. A witness is not obliged to attend as before any court, judge, justice, or any other officer of the county in which he resides, unless the distance is less than thirty miles from his place of residence to the place of trial.

§ 1990. A person present in court, or before a court officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by the court or officer.

§ 1991. Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as contempt by the court or officer issuing the subpoena, requiring the witness to be sworn; and if the witness is a party, his complaint or answer may be stricken from the record.

Disobedience to subpoena—46 Cal. 82.

Refusal to answer—sec. 2065; 35 Cal. 89.

Contempt—secs. 1209, 1219.

§ 1992. A witness disobeying a subpoena issued to the party aggrieved the sum of one hundred dollars and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

§ 1993. In case of failure of a witness to attend a court or officer issuing the subpoena, upon proof of the failure thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

§ 1994. Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein, particularly, the cause of the commitment, if it be for refusing to answer a question, such cause must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the Superior Court. [In effect April 16th, 1880.]

§ 1995. If the witness be a prisoner, confined in a jail or prison within this State, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer,

purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a Justice's Court;
2. By a justice of the Supreme Court, or a judge of the Superior Court of the county where the action or proceeding is pending, if pending before a Justice's Court, or before a judge or other person out of court. [In effect April 16th, 1880.]

§ 1996. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

§ 1997. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

CHAPTER III.

MANNER OF PRODUCTION.

- ART. I. MODE OF TAKING THE TESTIMONY OF WITNESSES.
- II. AFFIDAVITS.
- III. DEPOSITIONS.
- IV. MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.
- V. MANNER OF TAKING DEPOSITIONS IN THE STATE.
- VI. GENERAL RULES OF EXAMINATION.

ARTICLE I.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

- § 2002. Testimony, in what mode taken.
- 2003. Affidavit defined.
- 2004. A deposition defined.
- 2005. Oral examination defined.
- 2006. Deposition, how taken.

§ 2002. The testimony of witnesses is taken in the following modes:

1. By affidavit;
2. By deposition;
3. By oral examination.

§ 2003. An affidavit is a written declaration or oath, made without notice to the adverse party.

Affidavits—sec. 2009 *et seq.*

§ 2004. A deposition is a written declaration or oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

Depositions—secs. 2019-2021: form of, sec. 2006.

§ 2005. An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

General rules of examination—secs. 2042-2054.

§ 2006. Depositions must be taken in the form of questions and answers, and the words of the witness must be written down, unless the parties agree to a different mode.

Form of taking depositions—formerly, in narrative form, § 2006.

ARTICLE II.

AFFIDAVITS.

- § 2009. Affidavits and depositions, how taken.
 § 2010. Evidence of publication, what.
 § 2011. Where filed.
 § 2012. Affidavits to be used in this State, before whom may be taken in this State.
 § 2013. If made in another State of the United States, before whom taken.
 § 2014. If made in a foreign country, before whom taken.
 § 2015. Certificate of the clerk, if taken before a judge of a court out of this State.

§ 2009. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this Code.

Use of affidavits—31 Cal. 203.

Signature—not essential, 15 Cal. 53.

In foreign language—excluded, 23 Cal. 418.

Extent of affidavit—27 Cal. 298.

§ 2010. Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

Affidavit of publication—see sec. 413 π : "proprietor" synonymous with "printer," 37 Cal. 458.

§ 2011. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case, the original affidavit, or a copy thereof, certified by the judge of the court or clerk having it in custody, is *prima facie* evidence of the facts stated therein. [In effect July 1st, 1874.]

§ 2012. An affidavit to be used before any court, judge, or officer of this State, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this State.

Persons authorized to take affidavits—sec. 179, subd. 3: official character of justice of the peace, within the State, need not appear, 15 Cal. 53.

§ 2013. An affidavit taken in another State or Territory, or in any of the United States, to be used in this State, may be taken before a commissioner appointed by the governor of this State to take affidavits and depositions in such State, or before any notary public in another State, or before any judge or clerk of a court of record in this State, having a seal, in such foreign country. [In effect July 1st, 1874.]

§ 2014. An affidavit taken in a foreign country, to be used in this State, may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record in such foreign country, having a seal, in such foreign country. [In effect July 1st, 1874.]

§ 2015. When an affidavit is taken before a judge of a court in another State, or in a foreign country, the truth and genuineness of the signature of the judge, the existence of the court and the fact that such judge is a member of the court, must be certified by the clerk of the court, under the seal thereof.

ARTICLE III.

DEPOSITIONS.

§ 2019. Deposition, when used.

§ 2020. Testimony of a witness out of the State, when taken.

§ 2021. In the State, when taken.

§ 2019. In all cases other than those mentioned in sections two thousand and nine, where a written deposition under oath is used, it must be a deposition as provided by this Code.

§ 2020. The testimony of a witness out of the State may be taken by deposition, in an action, at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, at any time after a question of fact has arisen therein.

Manner of taking depositions out of the State—sec. 2021.

§ 2021. The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons on the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2. When the witness resides out of the county in which his testimony is to be used.

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

6. When the witness is the only one who can establish facts or a fact material to the issue; *provided*, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause. [In effect March 9th, 1878.]

Deposition—mode of taking, sec. 2006: who may take, 2 Cal. 25; sec. 179, subd. 3; in this state, manner of taking, sec. 2031 *et seq.*: name part of testimony, 49 Cal. 383: service of, 47 Cal. 644: strict construction before Code, 2 Cal. 28, 383: amending answer after, 47 Cal. 174.

SUBDIVISION 1. Party, etc.—29 Cal. 619.

SUBDIVISION 2. Out of county—29 Cal. 619.

ARTICLE IV.

MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

§ 2024. Testimony of witness out of State taken upon commission issued under seal, upon notice. To whom to issue.

§ 2025. Proper interrogatories may be prepared, or may be waived by the parties.

§ 2026. Authorities and duties of commissioner.

§ 2027. Trial, when postponed for reason of non-return of commission.

§ 2028. Depositions, by whom used.

§ 2024. The deposition of a witness out of this State may be taken upon commission issued from the court, under the seal of the court, upon an order of the court, or a judge thereof, on the application of either party, upon five days' previous notice to the other. If issued to any place within the United States, it may be directed to a person agreed upon by the parties, or, if they do not agree, to any judge or justice of the peace, or commissioner, selected by the court or judge issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties. [In effect April 16th, 1880.]

Commissioner—estoppel to dispute regularity of appointment, 27 Cal. 377.

§§ 2025-31 MANNER OF PRODUCTION.

§ 2025. Such proper interrogatories, direct as the respective parties may prepare to be the parties disagree as to their form, by the judge granting the order for the commission, at a in the order, may be annexed to the commission the parties agree to that mode, the examination without written interrogatories.

Interrogatories—question and answer in depositions, see

§ 2026. The commission must authorize the sioner to administer an oath to the witness, and his deposition in answer to the interrogatories, the examination is to be without interrogator spect to the question in dispute, and to certify sition to the court, in a sealed envelope, direct clerk or other person designated or agreed upon warded to him by mail or other usual channel of ance.

Certificate—sec. 2032n; 27 Cal. 372.

§ 2027. A trial or other proceeding must not poned by reason of a commission not returned upon evidence, satisfactory to the court, that mony of the witness is necessary, and that pr gence has been used to obtain it.

Continuance—none, where no diligence in obtaining cor Cal. 598.

§ 2028. The deposition mentioned in this ar be used by either party on the trial or other pr against any other party giving or receiving th subject to all just exceptions.

ARTICLE V.

MANNER OF TAKING DEPOSITIONS IN THIS STATE.

§ 2031. Depositions may be taken before a judge, etc., upon the adverse party.

§ 2032. Manner of taking depositions. May be used by either party on the trial.

§ 2033. When deposition excluded.

§ 2034. A deposition once taken may be read at any time.

§ 2035. Deposition in this State to be used in other States.

§ 2036. How to procure witness upon commission.

§ 2037. How, if no commission.

§ 2038. Deposition, how taken.

§ 2031. Either party may have the deposition a witness in this State, in either of the cases mentioned in section two thousand and twenty-one, before a judge or other officer authorized to administer oaths, on service of a subpoena.

the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.

Notice—absence of, 5 Cal. 444; contents of, 6 Cal. 559; proof of service of, 43 Cal. 485; service of, before Code, 47 Cal. 644; sufficiency of, 17 Cal. 37; time shortened, 17 Cal. 37.

§ 2032. Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under subdivisions two, three, and four, of section two thousand and twenty-one, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

Ex parte deposition—after notice, 6 Cal. 17.

Certificate—6 Cal. 559; 18 Cal. 330; 35 Cal. 30.

Objections to deposition—2 Cal. 383; 3 Cal. 94; 9 Cal. 68; 14 Cal. 542; 18 Cal. 330; 19 Cal. 683; 22 Cal. 42; 36 Cal. 191; 43 Cal. 485; when not admissible against executor, 51 Cal. 101.

§ 2033. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair.

§ 2034. When a deposition has been once taken, it may be read by either party in any stage of the same

action or proceeding, or in any other action between the same parties upon the same subject, and is then the evidence of the party reading it.

Reading deposition—in same action, 14 Cal. 542; sec. 2028. action, by stipulation, 22 Cal. 42.

§ 2035. Any party to an action or special proceeding in a court, or before a judge, of a sister State, may take the testimony of a witness residing in this State used in such action or proceeding, in the cases mentioned in the next two sections.

§ 2036. If a commission to take such testimony has been issued from the court, or a judge thereof, in which such action or proceeding is pending, on presentation of the commission to a judge of the Superior Court, and an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place. [In effect April 16th, 1880.]

Subpoena—sec. 1985 *et seq.*

§ 2037. If a commission has not been issued, a witness may appear to a judge of the Superior Court, or to a justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party;

2. That a commission to take the testimony of such witness has not been issued;

3. That, according to the law of the State where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and certified to such judge or justice, will be received in the action or proceeding; he must issue his subpoena requiring the witness to appear and testify before him at a specified time and place. [In effect April 16th, 1880.]

§ 2038. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that State requires.

ARTICLE VI.

GENERAL RULES OF EXAMINATION.

§ 2042. Order of proof, how regulated.

§ 2043. Witnesses not under examination may be excluded.

§ 2044. Court may control mode of interrogation.

§ 2045. Direct and cross-examination defined.

- § 2046. Leading question defined.
- 2047. When witness may refresh memory from notes.
- 2048. Cross-examination, as to what.
- 2049. Party producing witness, how far may impeach his credit.
- 2050. Witness, how examined. When re-examined.
- 2051. How impeached.
- 2052. Same.
- 2053. Evidence of good character, when allowed.
- 2054. Writing shown to witness may be inspected by adverse party.

§ 2042. The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.

Order of proof—controlled by court, sec. 607 and note: reopening case, sec. 607, subd. 3, note, and 5 Cal. 137: in criminal case, 47 Cal. 388: where assignment of contract, 27 Cal. 248.

§ 2043. If either party requires it, the judge may exclude from the court-room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

Exclusion of witnesses—proper, 53 Cal. 491: discretion of court, 29 Cal. 622: effect of disobeying order for, 20 Cal. 436.

§ 2044. The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be; but subject to this rule—the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

Control of court—over examination, 47 Cal. 194: answer of witness, secs. 2063, 2066: stopping further testimony, 39 Cal. 38.

§ 2045. The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

§ 2046. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

§ 2047. A witness is allowed to refresh his respecting a fact, by anything written by himself his direction at the time when the fact occurred diately thereafter, or at any other time when the fresh in his memory and he knew that the same rectly stated in the writing. But in such case, ing must be produced and may be seen by the party, who may, if he choose, cross-examine the upon it, and may read it to the jury. So, also, a may testify from such a writing, though he r recollection of the particular facts, but such must be received with caution.

Refreshing memory—4 Cal. 260; 49 Cal. 166.

Inspection of writing—shown to witness, sec. 2054.

§ 2048. The opposite party may cross-exam witness as to any facts stated in his direct exami connected therewith, and in so doing may put questions, but if he examine him as to other such examination is to be subject to the same r direct examination.

Cross-examination, scope and extent of—common terri Cal. 223: credibility of witness, attacking, 27 Cal. 63; 39 Cal. 425, and see impeachment: directing attention of witness, discretion of court, 36 Cal. 223; 45 Cal. 146; 47 Cal. 194: for and detainer, 36 Cal. 580: impeachment by collateral quest 65, 119: new matter, etc., 14 Cal. 18; 25 Cal. 212; 30 Cal. 159; objection, raising in time, 45 Cal. 146: party as witness, 41 Ca hibiting continuance, 47 Cal. 194: range of, 33 Cal. 641; 51 C recall for, 49 Cal. 632; 50 Cal. 137: responsive to direct exa Cal. 450; 7 Cal. 561; 14 Cal. 18; 33 Cal. 99; stopping further sec. 2044: stopping one's own witness, 36 Cal. 223.

§ 2049. The party producing a witness is not to impeach his credit by evidence of bad characte may contradict him by other evidence, and may a that he has made at other times statements inc with his present testimony, as provided in sec thousand and fifty-two.

Scope of provision—30 Cal. 394.

Discrediting one's own witness—49 Cal. 384: when not 30 Cal. 360: no need of contradicting at time, 22 Cal. 231: p one's witness, estoppel as to, 12 Cal. 308.

§ 2050. A witness once examined cannot be ined as to the same matter without leave of the c he may be re-examined as to any new matter up he has been examined by the adverse party. A the examinations on both sides are once concl witness cannot be recalled without leave of t

Leave is granted or withheld, in the exercise of a sound discretion.

Recalling witness—In criminal case, 49 Cal. 623: discretion of court, sec. 607, subd. 3, note; 50 Cal. 137; 51 Cal. 191.

§ 2051. A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

Compare—sec. 1847.

Impeaching adverse witness—*General reputation bad*, personal knowledge not sufficient, 53 Cal. 68: credibility, 41 Cal. 66; 48 Cal. 185; 49 Cal. 32, 632: not believing under oath, 12 Cal. 306; 35 Cal. 553: hostility, 48 Cal. 185: chastity, lack of, not ground, 27 Cal. 630; 48 Cal. 553. *Previous conviction of felony*, 39 Cal. 449, 614, 677; 50 Cal. 233; 51 Cal. 597. *Range of cross-examination*, collateral matters, 51 Cal. 597; 53 Cal. 65, 119: good character, showing after impeachment, sec. 2053n: laying foundation, 53 Cal. 425.

§ 2052. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

Inconsistent statements of witness—impeachment by showing, 2 Cal. 326; 16 Cal. 173, 222; 17 Cal. 605; 21 Cal. 368; 25 Cal. 587; 29 Cal. 421, 492; 33 Cal. 522; 43 Cal. 162; 44 Cal. 452; 47 Cal. 138; 48 Cal. 85, 185; 49 Cal. 384; 50 Cal. 628; 51 Cal. 551.

§ 2053. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

Evidence of good character—effect of, 49 Cal. 485: in criminal case, 49 Cal. 629: after impeachment, 48 Cal. 61; 50 Cal. 233: judge's indorsement of witness improper, 27 Cal. 300: rebutting, irrelevant, Donnelly v. Curran, March 18th, 1880, 5 Pac. C. L. J. 215.

§ 2054. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness.

Writing shown to witness—open to inspection, where merely identified, 52 Cal. 457: where put in evidence, 40 Cal. 638; where done to refresh memory, sec. 2047.

TITLE V.
OF THE RIGHTS AND DUTIES OF
WITNESSES.

- § 2064. Witnesses bound to attend when subpoenaed.
§ 2065. Witnesses bound to answer questions.
§ 2066. Right of witnesses to protection.
§ 2067. Witnesses protected from arrest when attending, or returning.
§ 2068. Arrest to be made void, and party making arrest liable.
§ 2069. To make affidavit if arrested.
§ 2070. Court to discharge witness from arrest.

§ 2064. A witness, served with a subpoena, must attend at the time appointed, with any papers under control required by the subpoena, and answer all proper and legal questions; and, unless sooner discharged, remain until the testimony is closed.

Subpoena—secs. 1985, 1991.

Answering questions—sec. 2065.

Witnesses—competency, etc., secs. 1878-1884; examination, mental, refreshing memory, etc., secs. 2042-2054.

§ 2065. A witness must answer questions legal and pertinent to the matter in issue, though his answers may establish a claim against himself; but he need not answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from the fact in issue would be presumed. But a witness need not answer as to the fact of his previous conviction for a crime.

Witness implicating himself—when privileged from answering—Cal. 184; degrading answer, 35 Cal. 89; 39 Cal. 449.

§ 2066. It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only as long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

Compare—sec. 2044.

Detention of witness—unreasonable, constitutional prohibition—see Const. Cal. art. 1, sec. 6.

§ 2067. Every person who has been, in good faith, served with a subpoena to attend as a witness

court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

Exemption from arrest—but not from obeying ordinary process, 6 Cal. 32.

§ 2068. The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with a subpoena, for the damages sustained by him in consequence of the arrest.

Contempt of court—see secs. 1209-1222.

§ 2069. An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating—

1. That he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

§ 2070. The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of section two thousand and sixty-seven. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge. [In effect April 16th, 1880.]

TITLE VI.

**Of Evidence in Particular Cases
Miscellaneous and General Provisions**

- CHAP. I. Evidence in particular cases, §§ 2074-2089.**
II. Proceedings to perpetuate testimony, §§ 2093-2095.
III. Administration of oaths and affirmations, §§ 2093-2095.
IV. General provisions, §§ 2101-2104.

CHAPTER I.

EVIDENCE IN PARTICULAR CASES.

- § 2074. An offer equivalent to payment.
- § 2075. Whoever pays entitled to receipt.
- § 2076. Objections to tender must be specified.
- § 2077. Rules for construing description of lands.
- § 2078. Compromise offer of no avail.
- § 2079. In action for divorce, admission not sufficient.

§ 2074. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

Offer to compromise—secs. 997, 2078.

Tender—alleging, 15 Cal. 376; 34 Cal. 616; attorney in fact, by, 1 Cal. 337; 49 Cal. 586; effect of, 14 Cal. 519; 34 Cal. 666; 41 Cal. 133; sufficiency of, 5 Cal. 339; 15 Cal. 208; 32 Cal. 168; *Herman v. Haffenegger*, Feb. 12th, 1880, 4 Pac. C. L. J. 559; sureties, by, 26 Cal. 535.

§ 2075. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

§ 2076. The person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward.

§ 2077. The following are the rules for constructing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars;

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measure-

§§ 2078-9 EVIDENCE IN PARTICULAR CASES.

ment, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

3. Between different measurements which are consistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to that of surfaces.

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title;

5. When tide-water is the boundary, the rights of the grantor to ordinary high-water-mark are included in the conveyance. When a navigable lake, where the tide is the boundary, the rights of the grantor to ordinary water-mark are included in the conveyance;

6. When the description refers to a map, and the reference is inconsistent with other particulars, it prevails over them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars. [In effect July 1, 1880.]

Description in conveyance—construction of, sec. 1860; 1 Cal. 435; 25 Cal. 296, 440; 29 Cal. 386; 30 Cal. 468; 34 Cal. 312, 606; 37 Cal. 432; 39 Cal. 122, 239; 42 Cal. 326; 43 Cal. 171, 213; 47 Cal. 474; 49 Cal. 59; 50 Cal. 171, 429; 51 Cal. 125, 198; 52 Cal. 500, 579, 655. *Sherman v. McCarthy*, March 3rd, 1880, 5 Pac. C. L. J. 92. *Black v. Sprague*, March 6th, 1880, 5 Pac. C. L. J. 92; construction of instruments, generally, sec. 1859 and note.

SUBDIVISION 1. Definite particulars prevail—10 Cal. 63; 27 Cal. 57; 34 Cal. 624; 36 Cal. 125; 41 Cal. 263; 44 Cal. 132, 610; 47 Cal. 581; 48 Cal. 28; 49 Cal. 525; 53 Cal. 589.

SUBDIVISION 2. Boundaries or monuments paramount—11 Cal. 590; 11 Cal. 197; 12 Cal. 163; 17 Cal. 231; 22 Cal. 496; 26 Cal. 615; 29 Cal. 178, 386; 32 Cal. 11, 219; 34 Cal. 334; 37 Cal. 436; 38 Cal. 461; 43 Cal. 219; 47 Cal. 67; 50 Cal. 376, 429; 52 Cal. 442, 496; 53 Cal. 500, 579, 655. *Black v. Sprague*, March 6th, 1880, 5 Pac. C. L. J. 92.

SUBDIVISION 3. Lines and angles prevail—22 Cal. 502.

SUBDIVISION 4. Road or stream as boundary—22 Cal. 412; 42 Cal. 326; 50 Cal. 31; 51 Cal. 195, 425.

SUBDIVISION 6. Reference to map—10 Cal. 589; 24 Cal. 448; 47 Cal. 52; 50 Cal. 321, 333, 429, 450; *Black v. Sprague*, March 6th, 1880, 5 Pac. C. L. J. 92.

§ 2078. An offer of compromise is not an admission that anything is due.

Offer to compromise—after suit brought, sec. 997.

§ 2079. In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of court, and in the pleadings, is not of itself sufficient to justify a judgment of divorce.

Divorce—generally, sec. 76, subd. 4, note.

Confessions—must be corroborated, 41 Cal. 103; as evidence, generally, sec. 1870, subd. 2n.

CHAPTER II.

PROCEEDINGS TO PERPETUATE TESTIMONY.

- § 2083. Evidence may be perpetuated.
- 2084. Manner of application for order.
- 2085. Notice of time and place to be given.
- 2086. Manner of taking the deposition.
- 2087. Deposition to be filed.
- 2088. When the evidence may be produced.
- § 2089. Effect of the deposition.

§ 2083. The testimony of a witness may be taken and perpetuated as provided in this chapter.

§ 2084. The applicant must produce to a judge of the Superior Court a petition, verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this State, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this State, must be personally served, and if unknown, such notice must be served on the clerk of the county where the property to be affected by such evidence is situated, or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the clerk of the county to whom the deposition must be returned when taken. [In effect April 16th, 1880.]

§§ 2085-8 TO PERPETUATE TESTIMONY.

§ 2085. The person appointed by the judge the depositions is authorized, if a resident of the State, on receiving a copy of the order of the judge, and notice prescribed in the last section, with proof of personal service or publication—or, if a resident with the State, on receiving the commission mentioned in the next section, with proof of like service of public notice—to take the deposition of the witness named in the order of the judge, or in the commission, or, if more than one witness is thus named, of such of them as may appear before him, at the time designated, and the deposition of the same may be continued from time to time. [In effect July 1st, 1874.]

§ 2086. The examination must be by question and answer, and if the testimony is to be taken in another State, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories settled in the same manner as in cases of depositions taken under commission in pending actions, upon the parties expectant, if known, otherwise agree. If the parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper of such time as the judge may designate. The deposition when completed, must be carefully read to and sworn to by the witness, then certified by the officer or person appointed, and the same, and shall then be sealed up and delivered to the clerk of the county designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the clerk the order for the taking of the deposition, the petition on which the same was granted, and proof of service of the order and notice. [In effect July 1st, 1874.]

§ 2087. The petition and order, and papers filed with the judge as provided in section two thousand and eight hundred and six, or a certified copy thereof, are *prima facie* evidence of the facts stated therein to show compliance with the provisions of this chapter. [In effect July 1st, 1874.]

§ 2088. If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be necessary to establish the facts which such depositions purport to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable, on reason of age or other infirmity, to give their testimony,

the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attended at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination. [In effect July 1st, 1874.]

§ 2089. The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

CHAPTER III.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

- § 2093. Judicial and certain officers authorized to administer oaths.
- § 2094. Form of ordinary oath to a witness.
- § 2095. Form may be varied to suit witness' belief.
- § 2096. Same.
- § 2097. Any person who prefers it may declare or affirm.

§ 2093. Every court, every judge or clerk of an inferior court, every justice and every notary public, and every person authorized to take testimony in any proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

Administration of oaths—by whom, sec. 128, subd. 7; sec. 4; Political Code, secs. 1028, 4118; by clerk for court, 48 Cal. 197; in jury questions, 49 Cal. 383.

§ 2094. An oath, or affirmation, in an action or proceeding, may be administered as follows, the person swearing, or affirms, expressing his assent when administered in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue, (or matter) pending between — a party and another, shall be the truth, the whole truth, and nothing but the truth, so help you God." [In effect July 1st, 1874.]

§ 2095. Whenever the court before which a proceeding is held offers as a witness is satisfied that he has a mode of swearing, connected with, or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may in its discretion, adopt that mode.

§ 2096. When a person is sworn who believes in a religion other than the christian religion, he may be sworn in according to the peculiar ceremonies of his religion, if there be any such.

§ 2097. Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare) that the evidence you shall give in this issue, (or matter) pending between — a party and another, shall be the truth, the whole truth, and nothing but the truth, etc., as in section two thousand and ninety-four."

CHAPTER IV.
GENERAL PROVISIONS.

- § 2101. Questions of fact to be decided by the jury, and the evidence addressed to them.
 § 2102. Questions of law addressed to the court.
 § 2103. Questions of fact by court or referee.
 § 2104. Moneys paid into court.

§ 2101. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code. [In effect July 1st, 1874.]

Compare—sec. 2061.

Questions of fact, for jury—4 Cal. 260; 9 Cal. 563; 18 Cal. 376; 25 Cal. 197; 30 Cal. 215; 32 Cal. 213; 34 Cal. 663; and see 52 Cal. 315; *People v. Wong Ah Ngow*, Feb. 10th, 1880, 4 Pac. C. L. J. 552; *People v. Mitchell*, May 29th, 1880, 5 Pac. C. L. J. 473: effect of evidence, for jury, sec. 2061 and note: fraudulent intent, Civil Code, sec. 3442; 50 Cal. 137, 140; negligence, as to, 50 Cal. 578, 581; 52 Cal. 45: nuisance, 29 Cal. 156; 30 Cal. 379; 45 Cal. 55: presumptions of fact, 51 Cal. 588.

§ 2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this Code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

Province of court—questions of law, 6 Cal. 119; 15 Cal. 27, 367; 24 Cal. 268; 30 Cal. 548; 36 Cal. 462; 44 Cal. 145; 45 Cal. 255; 49 Cal. 253; 52 Cal. 244; admissibility of evidence, etc., 4 Cal. 105; 23 Cal. 339; 47 Cal. 194; 49 Cal. 56: construction of writings, 39 Cal. 523; 50 Cal. 32.

Knowledge of the court—scope of judicial notice, sec. 1875 and notes.

§ 2103. The provisions contained in this part of the Code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee, or other officer.

§ 2104. Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it

with the county treasurer, to be held by him s
the order of the court. The treasurer shall k
fund distinct, and open an account with each.
pointment shall be filed with the county treas
shall exhibit it, and give to each person applyin
same a certified copy of the same. It shall be
until a revocation in writing is filed with th
treasurer, who shall thereupon write "revoked
across the face of the appointment. [In effect
1874.]

Deposit in court—secs. 572-574; corresponding provision,

Deposit with county treasurer—liable to taxation, 30 Cal.

Final repealing clause—compare, secs. 9, 18.

INSOLVENT ACT.

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INSOLVENT ACT OF 1880.

ARTICLE I.

GENERAL SUBJECT OF THE ACT.

§ 1. Every insolvent debtor may, upon compliance with the provisions of this act, be discharged from his debts and liabilities. This act shall be known and may be cited as the Insolvent Act of eighteen hundred and eighty.

Strict construction—7 Cal. 423; 9 Cal. 473; 31 Cal. 167.

Insolvency decisions—sec. 1822a.

Repealing clause—sec. 63.

Suspension—of State insolvent laws by Federal Bankrupt Law, *Boedfeld v. Read*, July 20th, 1880; *Lewis v. Santa Clara County Court*, Sept. 3rd, 1880.

ARTICLE II.

VOLUNTARY INSOLVENCY.

§ 2. An insolvent debtor, owing debts exceeding in amount the sum of three hundred dollars, may apply by petition to the Superior Court of the county, or city and county, in which he has resided for six months next preceding the filing of his petition, to be discharged from his debts and liabilities. In his petition he shall set forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts and liabilities, and shall annex thereto a schedule and inventory, and valuation, in compliance with the provisions of this act. The filing of such petition shall be an act of insolvency, and thereupon such petitioner shall be adjudged an insolvent debtor.

Petition—requisites, 8 Cal. 44; 19 Cal. 162; 32 Cal. 406; and see next note: amendment, sec. 8a; 22 Cal. 38; objections, raising, sec. 50a.

Residence—six months in county, averring in petition, 10 Cal. 483;

33 Cal. 530, 540; 34 Cal. 92; and compare, 28 Cal. 599: generally Civ. Proc. sec. 198, subd. 1n.

Superior Court—jurisdiction of proceedings in insolvency. Civ. Proc. sec 76, subd. 4.

§ 3. Said schedule must contain a full and true statement of all his debts and liabilities, exhibiting to the best of his knowledge and belief to whom said debts and liabilities are due, the place of residence of his creditors, the sum due to each; the nature of the indebtedness, whether demand, whether founded on written security, obligation, contract, or otherwise; the true cause and consideration thereof, and the time and place when and where the indebtedness accrued, and a statement of any security, pledge, lien, mortgage, judgment, or other security affecting the payment of the same.

Schedule—contents of, 10 Cal. 418, 483; 14 Cal. 173; 19 Cal. 530: objections to, sec. 50n; 22 Cal. 38; 31 Cal. 328; 32 Cal. 406;

§ 4. Said inventory must contain an accurate statement of all the estate, both real and personal, of the petitioner, including his homestead, if any, and all property exempt by law from execution, and where the same is situated, and all incumbrances thereon.

Inventory—see SCHEDULE, sec. 3n.

§ 5. The petition, schedule, and inventory to be filed shall be verified by the affidavit of the petitioner annexed thereto, and shall be in form substantially as follows: I, _____, do hereby solemnly swear that the schedule and inventory herewith delivered by me contain a full, perfect, and true disclosure of all the estate, real, personal, and mixed, goods and effects to me in any way belonging; all such debts and claims to me owing, or to any person or persons in trust for me, and all securities and contracts, and contracts to which any money may hereafter become payable, or any benefit or advantage accrue to me or to my use, or to any person or persons in trust for me; that I have not disposed of, or concealed any part of my property, effects, or interests, that set forth in my schedule and inventory; that I have in no instance, created or acknowledged a debt or liability greater sum than I honestly and truly owe; that I have not, directly or indirectly, sold, or otherwise disposed of, or concealed any part of my property, effects, or interests; that I have not in any way compounded with my creditors whereby to secure the same, or to receive any profit or advantage therefrom, or to receive any money or to deceive any creditor to whom I am indebted in any manner. So help me God.

Signature—to petition and schedule, 19 Cal. 162; 32 Cal. 47

§ 6. Upon receiving and filing such petition, schedule, and inventory, the court shall make an order declaring the petitioner insolvent, and directing the sheriff of the county to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee. Said order shall further forbid the payment of any debts and the delivery of any property belonging to such debtor, to him, or for his use, and the transfer of any property by him; and shall further appoint a time and place for a meeting of the creditors, to prove their debts and choose one or more assignees of the estate, which shall not be less than thirty days after the making of said order, and shall designate a newspaper or newspapers of general circulation in which publication thereof shall be made. Upon the granting of said order, all proceedings against the said insolvent shall be stayed.

Deposit of books, etc.—sec. 22.

Not less than thirty days—notice of creditors' meeting, 34 Cal. 167; *Wilson v. His Creditors*, July 6th, 1880, 5 Pac. C. L. J. 662.

Order staying proceedings—operates from date, 14 Cal. 47; enforcement of, *Bandy v. Ransome*, Jan. 19th, 1880, 4 Pac. C. L. J. 537.

Combining proceedings—under this section, and issuing from chambers, 36 Cal. 24.

§ 7. A copy of said order shall immediately be published by the clerk of said court, in the newspaper or newspapers designated therein, as often as the newspaper is printed before the meeting of creditors, and be served by the clerk forthwith by United States mail, postage prepaid, or personally, on all creditors named in the schedule. The order of adjudication shall direct the publication thereof in a newspaper published in the county, or city and county, in which the petition is filed, if there be one, and if there be none, in a newspaper published nearest to such county, or city and county; *provided*, that no order of adjudication upon creditors' petition shall be entered, unless there first be deposited with the clerk, in addition to the usual cost of commencing said proceedings, a sum of money sufficient to defray the cost of the publication ordered by the court, and ten cents for each copy, to be mailed to or served on the creditors, which latter sum is hereby constituted the legal fee of the clerk for the mailing or service required in this section.

Publication of notice to creditors—jurisdictional importance, 19 Cal. 162; 22 Cal. 38; 31 Cal. 168; proof of, 31 Cal. 201; 33 Cal. 530; and compare as to summons, Code Civ. Proc. sec. 414, subd. 3, note.

Service by mail—compare as to deposit of summons, Proc. sec. 413; 9 Cal. 616; 33 Cal. 505.

Personal service—compare as to summons, Code Civ. 410, 411.

ARTICLE III.

INVOLUNTARY INSOLVENCY.

§ 8. An adjudication of insolvency may be made on the petition of five or more creditors, resident in this State, whose debts or demands accrued in this State to the amount in the aggregate to not less than five hundred dollars; *provided*, that said creditors, or either of them, have not become creditors by assignment within thirty days prior to the filing of said petition. Such petition must be filed in the Superior Court of the county and county, in which the debtor resides or has his principal place of business, and must be verified by at least three petitioners, setting forth that such person is absent from the State, with intent to defraud his creditors; or being absent from the State with such intent, he remains absent; or conceals himself to avoid the execution of legal process; or conceals, or is removing any of his property to avoid its being attached or taken in legal process; or being insolvent, has suffered his property to remain under attachment, or legal process, for forty days; or has confessed, or offered to allow judgment to be entered against any creditors; or willfully suffered judgment to be entered against him by default; or has suffered, or permitted, his property to be taken on legal process, with intent to give a preference to one or more of his creditors; or has made any assignment, gift, sale, conveyance, or transfer of his real estate, property, rights, or credits, with intent to defraud, or hinder his creditors; or in contempt of court, on insolvency, has made any payment, gift, grant, sale, conveyance, or transfer of his estate, property, rights, or credits; or has been arrested and held in custody for the term of any civil process of court founded on any demand, and such process remains in force, and he has not been charged by payment, or otherwise, for a period of thirty days; or being a merchant or tradesman, has stopped payment, and not resumed payment within a period of forty days after maturity of any written acknowledgment of indebtedness, unless the party holding such acknowledgment has, in writing, waived the right to proceed under this subdivision; or being a bank, or other agent, broker, factor, or commission merchant, has stopped payment for forty days to pay any moneys deposited with

ceived by him in a fiduciary capacity, upon demand of payment, excepting savings and loan banks, or associations, who loan the money of their stockholders and depositors on real estate, and provide in their by-laws for the repayment of such deposits. The petitioners may, from time to time, amend and correct the petition, so that the same shall conform to the facts, by leave of the court before which the proceedings are pending, but nothing in this section shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan; the said petition shall be accompanied by a bond with two sureties in the penal sum of at least five hundred dollars, conditioned that if the debtor should not be declared an insolvent, the petitioners will pay all costs and damages, including a reasonable attorney's fee, that the debtor may sustain by reason of the filing of said petition. The court may, upon motion, direct the filing of an additional bond with different sureties when deemed necessary.

Intent to defraud his creditors—see sec. 55, notes.

Conceals himself—to avoid service of process, compare as to publication of summons, Code Civ. Proc. sec. 412; 6 Cal. 201; 12 Cal. 283; 26 Cal. 149.

Fiduciary capacity—see 8 Cal. 619.

Amended petition—compare Code Civ. Proc. sec. 473 and notes.

Bond—compare UNDERTAKING, GENERALLY, Code Civ. Proc. sec. 941a.

§ 9. Upon the filing of such creditors' petition, the court shall issue an order requiring such debtor to show cause, at a time and place to be fixed by said court, why he should not be adjudged an insolvent debtor, and at the same time, or thereafter, upon good cause shown therefor, said court may make an order forbidding the payment of any debts, and the delivery of any property belonging to such debtor to him or for his use, or the transfer by him.

Order forbidding payment, etc.—see sec. 6: injunction generally, compare Code Civ. Proc. sec. 525 *et seq.*

§ 10. A copy of said petition, with a copy of the order to show cause, shall be served on the debtor, in the same manner as is provided by law for the service of summons in civil actions, but such service shall be made at least ten days before the time fixed for the hearing; *provided*, that if, for any reason, the service is not made, the order may be renewed, and the time and place of hearing changed; or by a supplemental order by the court, or if

such debtor cannot be found, or his place of abode ascertained, service shall be made by publication as provided in the Code of Civil Procedure for service of summons by publication.

Service of summons—in civil actions, Code Civ. Proc. sec. 412 and notes.

Publication of summons—Code Civ. Proc. secs. 412, 413

§ 11. At the time fixed for the hearing of said petition, or such other time as it may be adjourned, the debtor may demur to the petition for the same reasons as is provided for demurrer in other cases by the Code of Civil Procedure. If the demurrer be overruled, the debtor shall have ten days thereafter in which to answer the petition. If the debtor answer the petition, such answer shall contain a specific denial of the material allegations of the petition controverted by him, and shall be in the same manner as pleadings in civil actions. The issues raised thereon may be tried with or without a jury, according to the practice provided by law for the trial of civil actions.

Demurrer—Code Civ. Proc. sec. 430 and notes.

Answer after demurrer—overruled, compare Code Civ. Proc. sec. 472 and note.

Contents of answer—compare Code Civ. Proc. sec. 437 and notes.

Verification of pleadings—Code Civ. Proc. sec. 446 and notes.

Trial of civil actions—Code Civ. Proc. secs. 588-661.

§ 12. If the respondent shall make default, or shall fail to appear at a trial, the issues are found in favor of the petitioner, the court shall make an order adjudging that said petition is, and was at the time of filing the petition, true, and that the debtor is a solvent debtor, and shall require said debtor, within a certain time as the court may designate, to file in court a schedule and inventory provided for in sections three and four of this act; and thereupon all proceedings shall be had in said matter in the same manner as if said debtor had voluntarily filed his petition.

§ 13. If, upon such hearing or trial, the issues are found in favor of the respondent, the proceedings shall be dismissed, and the respondent shall recover of the petitioning creditors in the same manner as in civil actions.

Costs—in civil actions, Code Civ. Proc. sec. 1021 *et seq.*

§ 14. If the debtor has failed to appear after due diligence has been used to find him personally or by publication, or is absent, or cannot be found, the schedule and inventory may be prepared by the court.

the sheriff, or by the assignee, from the best information he can obtain.

ARTICLE IV.

ASSIGNEES.

§ 15. At a meeting of the creditors, in open court, those having proven their claims, by filing a verified statement showing the amount, nature, and security, if any, shall proceed to the election of one assignee. The assignee shall be a resident of the county where the insolvent resides, or where he has carried on his business. In electing an assignee, the opinion of the majority in amount of claims shall prevail. The clerk of the court shall keep a minute of the deliberations of said creditors, and of the election and appointment of an assignee, and enter the same upon the records of the court. The assignee shall file, within five days, unless the time be extended by the court, with the clerk, a bond, in an amount to be fixed by the court, to the State of California, with two or more sufficient sureties, approved by the court, and conditioned for the faithful performance of the duties devolving upon him. The bond shall not be void upon the first recovery, but may be sued upon from time to time by any creditor aggrieved, in his own name, until the whole penalty is exhausted. The sureties on such bond may be required to justify, upon the application of any party interested, in the same manner as bail upon arrest in civil cases.

Residence—sec. 2n.

Bond—see sec. 8n: successive suits on, compare Code Civ. Proc. sec. 1392.

Justification of bail upon arrest—Code Civ. Proc. secs. 493-496.

§ 16. If, on the day appointed for the meeting, the creditors do not attend, or refuse to elect an assignee; or if, after election, the assignee shall fail to qualify within the proper time, it shall be lawful for the court before which the said meeting may take place, to appoint an assignee and fix the amount of his bond.

Title of assignee—when vests, 14 Cal. 47; 39 Cal. 137; 48 Cal. 201.

Estate conveyed by assignment—toll franchise does not pass, 41 Cal. 507.

Exempt from execution—Code Civ. Proc. sec. 690 and notes.

§ 17. As soon as an assignee is appointed and qualified, the clerk of the court shall, by an instrument under his hand, and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor,

with all his deeds, books, and papers relating to the such assignment shall relate back to the commencement of the proceedings in insolvency, and by operation shall vest the title to all such property and estate, real and personal, in the assignee, although the same were then attached on mesne process, as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all the estate of the insolvent debtor not exempt by law from execution.

Assignee prosecuting action—see sec. 21, subd. 1: substatute insolvent, compare Code Civ. Proc. sec. 385.

Conclusive evidence—see Code Civ. Proc. sec. 1837.

§ 18. The assignee shall have the right to recover the estate, debts, and effects of said insolvent debtor at the time of the commencement of proceedings in insolvency. If an action is pending in the name of the debtor at the time of recovery of a debt or other thing which might or could pass to the assignee by the assignment, the assignee may be allowed and admitted to prosecute the action in the same manner and with like effect as if it had been commenced by him. In suits prosecuted by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue.

Certified copy—of assignment, compare Code Civ. Proc. sec. 1923.

Conclusive evidence—sec. 17n.

§ 19. The assignee shall, within one month after the making of the assignment to him, cause the same to be recorded in every county, or city and county, within the State where any lands owned by the debtor are situated, and the record of such assignment, or a duly certified copy thereof, shall be conclusive evidence thereof in any action.

Resignation of assignee—compare Code Civ. Proc. sec. 1923.

§ 20. Any assignee may at any time, by written instrument filed in court, resign his appointment, having first settled his accounts, and delivered up all the estate to his successor as the court shall appoint; *provided*, that in the discretion of the court, the circumstances of the case require it, upon good cause being shown, the court may at any time before such settlement of account and such resignation of the estate shall have been completed, revoke the appointment of such assignee and appoint another in his stead. The liability of the outgoing assignee, and his sureties on his bond, shall not be in any manner affected.

charged, released, or affected by such appointment of another in his stead.

§ 21. The said assignee shall have power:

1. To sue in his own name and recover all the estate, debts, and things in action, belonging or due to such debtor, and no set-off or counter-claim shall be allowed in any such suit, for any debt, unless it was owing to such creditor by such debtor at the time of the adjudication of insolvency;

2. To take into his possession all the estate of such debtor except property exempt by law from execution, whether attached or delivered to him, or afterward discovered, and all books, vouchers, evidence of indebtedness, and securities belonging to the same;

3. In case of a non-resident absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his possession any moneys arising from the sale of such property, all such property and moneys, on paying him his lawful costs and charges for attaching and keeping the same;

4. From time to time to sell at public auction all the estate, real and personal, vested in him as such assignee, which shall come to his possession and as ordered by the court;

5. On such sales to execute the necessary conveyances and bills of sale;

6. To redeem all valid mortgages and conditional contracts, and all valid pledges of personal property, and to satisfy any judgments which may be an incumbrance on any property sold by him, or to sell such property subject to such mortgage, contracts, pledges, or judgments.

7. To settle all matters and accounts between such debtor and his debtors, subject to the approval of the court;

8. Under the order of the court appointing him, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person;

9. To have and recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to any provision of this act, the property thereby transferred or assigned, or in case a redelivery of the property cannot be had, to recover the value thereof, with damages for the detention.

POWERS OF ASSIGNEE.

SUBDIVISION 1. Sue in his own name, etc.—see sec. 18. Counter-claim—see Code Civ. Proc. sec. 438 and notes.

SUBDIVISION 2. Exemptions—see Code Civ. Proc. sec. attachment—see Code Civ. Proc. 537 *et seq.* Books, etc.—see previous control, sec. 6: deposited with clerk, sec. 22.

SUBDIVISION 3. Attachment—see Code Civ. Proc. 537-559

SUBDIVISION 4. Sale of property—by assignee, secs. 25-

SUBDIVISION 6. Satisfaction of judgment—see Code sec. 675 and note.

SUBDIVISION 8. Compound with debtor—compare as to etc., Code Civ. Proc. sec. 1588: accord and satisfaction, see Code secs. 1521-1524.

SUBDIVISION 9. Fraudulent transfers—sec. 55. Claim livery—see Code Civ. Proc. sec. 509 *et seq.* Damages for debt see under REPLEVIN JUDGMENT, Code Civ. Proc. sec. 667a.

§ 22. The insolvent shall, either before or on appointed for the meeting of creditors, deliver to the assignee all the commercial or account books he may have, and all other books which books shall be deposited in the clerk's office of the said court. Said insolvent shall also deliver to the assignee at the same time, all vouchers, notes, bonds, bills, receipts, or other evidences of debt, in any manner relating to the estate or having any bearing upon or connection with the estate, or any security surrendered by said debtor, and all such papers and securities shall be deposited in the clerk's office of the said court, and the clerk shall hand them over, together with the books of the insolvent, to the assignee who is to be appointed.

Books, vouchers, etc.—see secs. 6 and 21, subd. 2: effect of deposit, 19 Cal. 691; 31 Cal. 201.

§ 23. If any person, before the assignment is made, having notice of the commencement of proceedings against the insolvent, embezzles or disposes of any of the insolvent's goods, chattels, or effects of the insolvent, he is liable therefor, and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the estate.

Embezzlement of property of estate—compare Code Civ. Proc. sec. 1458 and notes.

§ 24. The same penalties, forfeitures, and proceedings, by citation, examination, and commitment, shall be enforced on behalf of an assignee against persons suspected of having concealed, embezzled, conveyed away, or disposed of any property of the debtor, or of having possession or control of any deeds, conveyances, bonds, contracts, or writings which relate to any interest of the debtor in any real or personal estate, as provided in the case of the estates of deceased persons in sections one thousand four hundred and fifty-nine, one thousand four hundred

sixty, and one thousand four hundred and sixty-one of the Code of Civil Procedure.

§ 25. The assignee shall as speedily as possible convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid, unless made under the order of the court upon a petition in writing, which shall set forth the facts showing the sale to be necessary. Upon filing the petition, notice of at least ten days shall be given by publication and mailing, in the same manner as is provided in section seven of this act. If it appears that a private sale is for the best interests of the estate, the court shall order it to be made.

Private sale—on petition and order, compare Code Civ. Proc. secs. 1517, 1518 and notes.

§ 26. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or is liable to deteriorate in value, or is disproportionately expensive to keep, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the sheriff or assignee, as the case may be, who shall hold the funds received in place of the property sold until the further order of the court.

Sale of perishable or depreciating property—compare Code Civ. Proc. sec. 1522.

§ 27. Outstanding debts, or other property due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, may be sold and assigned in like manner as the remainder of the estate.

§ 28. Assignees shall be allowed all necessary expenses in the care, management, and settlement of the estate, and shall collectively be entitled to charge and receive for their services commissions upon all sums of money coming to their hands and accounted for by them, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent.; and for all above that sum, at the rate of four per cent.

Assignee's fees—compare Code Civ. Proc. secs. 1616, 1618 and notes.

§ 29. At the expiration of three months from the appointment of the assignee in any case, or as much earlier as the court may direct, the assignee shall exhibit to the court and to the creditors, and file with the court a true and correct list of all his receipts and payments verified by his oaths, and a statement of the property outstanding, specifying the cause of its outstanding, also what debts or claims are yet undetermined, and stating what sum remains in the assignee's possession; and thereupon a dividend shall be made to the creditors, unless for cause the court shall otherwise order. Thereafter the assignee shall render further accounts, statements, and dividends shall be made in like manner as often as occasion requires.

Accounts—compare as to executors, etc., Code Civ. Proc. § 287 *et seq.*

§ 30. The court shall at any time, upon the application of any two or more creditors, require the assignee to render an account, and if he has funds subject to distribution, he shall be required to distribute them without delay.

§ 31. All creditors whose debts are duly proved shall be entitled to share in the property of the assignor *pro rata* without priority or preference other than as provided in this act, and in section 29, and in sections thousand two hundred and four of the Code of Civil Procedure; *provided*, that any debt proved by a creditor who is liable as bail, surety, guarantor, or otherwise, for the debt of another, shall not be paid to the person so proving the debt until satisfactory evidence shall be produced of the existence of such debt by such person so liable; and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the creditors entitled thereto, as the court may direct.

Preferred claims for wages—Code Civ. Proc. sec. 1204.

Payment into court—see Code Civ. Proc. secs. 572-574, 2104.

§ 32. No dividend already declared shall be set aside by reason of debts being subsequently proved, but creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors, before any further dividend is made to the creditors; *provided*, the failure to prove such claim shall not be a bar, unless it resulted from his own neglect.

§ 33. Should the assignee refuse or neglect to render his accounts as required by sections thirty and thirty-one, or pay over a dividend when he shall have, in the opinion of the court, sufficient funds for that purpose, the court shall immediately discharge such assignee from his duties.

and shall have power to appoint another in his place. The assignee so discharged shall forthwith deliver over to the assignee appointed by the court all the funds, property, books, vouchers, or securities belonging to the insolvent, without charging or retaining any commission or compensation for his personal services.

§ 34. Preparatory to the final account and dividend the assignee shall submit his account to the court and file the same, and shall at the time of filing accompany the same with an affidavit that notice by mail has been given to all creditors who have proved their claims, that he will apply for a settlement of his account, and for a discharge from all liability as assignee at a time specified in such notice, which time shall be not less than ten or more than twenty days from such filing. At the hearing, the court shall audit the account, and any person interested may appear and file exceptions in writing, and contest the same. The court thereupon shall settle the account and order a dividend of any portion of the estate remaining undistributed, and shall discharge the assignee, subject to compliance with the order of the court, from all liability as assignee to any creditor of the insolvent.

Final account—notice, contest, settlement: compare as to executor, etc., Code Civ. Proc. secs. 1633-1638.

ARTICLE V.

PARTNERSHIPS AND CORPORATIONS.

§ 35. Two or more persons who are partners in business may be adjudged insolvent, either on the petition of such partners or any one of them, or on the petition of five or more creditors of the partnership, in which case an order shall be issued in the manner provided by this act, upon which all the joint stock and property of the partnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be exempt by law, and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the copartnership, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof, and, after deducting out of the whole amount received by such assignee, the whole amount of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate

of each partner shall be appropriated to pay his creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint estate for the payment of the joint creditors; and if there shall be any balance of the joint stock, after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estate of the partners according to their respective right and therein, and as it would have been if the partnership had been dissolved without any insolvency; and the amount appropriated to the separate estate of each partner shall be applied to the payment of his separate debts, and a certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the partnership had been by or against him alone under the provisions of this act, and in all other respects the proceedings as to the separate estate shall be conducted in the like manner as if they had commenced and prosecuted by or against one partner alone. If such copartners reside in different counties, the court in which the petition is first filed shall have exclusive jurisdiction over the case. If the petition is filed by less than all the partners of a copartnership, the partners who do not join in the petition shall be required to show cause why they should not be adjudged insolvent, in the same manner as other debtors are required to show cause upon a creditor's petition, as in and to the effect provided.

Before this enactment—partners could not be adjudged insolvent. 5 Cal. 195; 8 Cal. 44; *Creditors v. Huston*, July 21st, 1880; *firm property, Cal. F. Co. v. Halsey*, March 15th, 1880, 5 Pa. 125.

§ 36. The provisions of this act shall apply to the officers and directors of any corporation, and upon the petition of any officer of any corporation, duly authorized by the vote of the board of directors or trustees, at a meeting specially called for that purpose, or by the assent in writing of a majority of the directors or trustees, as the case may be, or upon a creditor's petition made and presented in the manner provided in respect to debtors, the like proceedings may be had and taken as are provided in the case of debtors. All the provisions of this act, which apply to the officers of any corporation, or set forth his duties, examination, and liabilities, or prescribe penalties, or relate to fraudulent conveyances, payments, and assignments, apply to each officer of any corporation in relation to the same as if he were a partner in the corporation. Whenever any corporation is declared insolvent, all its property and assets

distributed to the creditors; but no discharge shall be granted to any corporation.

Corporations—see Civil Code, secs. 283-648.

ARTICLE VI.

PROOF OF DEBTS.

§ 37. All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing but not payable until a future time, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the debtor.

§ 38. All demands against the debtor for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so withheld, from the time of the conversion.

§ 39. If the debtor shall be bound as indorser, surety, bail, or guarantor, upon any bill, bond, note, or other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until the adjudication of insolvency, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

§ 40. In all cases of contingent debts, and contingent liabilities contracted by the debtor, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends if the contingency shall happen before the order for the final dividend, or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall be done in such manner as the court shall order, and shall be allowed to prove for the amount so ascertained.

§ 41. Any person liable as bail, surety, or guarantor, or otherwise, for the debtor who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in insolvency were commenced; and any person so liable for the debtor, and who has not paid the whole of said debt but is still liable for the same, or any part thereof,

may, if the creditor shall fail or omit to prove s
prove the same in the name of the creditor.

Surety's claim for contribution—see Code Civ. Proc. se

§ 42. Where the debtor is liable to pay rent
debt falling due at fixed and stated periods, the
may prove for a proportionate part thereof up to
of the insolvency, as if the same became due fro
day, and not at such fixed and stated periods.

§ 43. In all cases of mutual debts and mutua
between the parties, the account between them
stated, and one debt set off against the other,
balance only shall be allowed and paid. But no
counter-claim shall be allowed of a claim in its n
provable against the estate; *provided*, that no
counter-claim shall be allowed in favor of any o
the insolvent of a claim purchased by or trans
him after the filing of the petition by or against
the purpose of making such set-off or counter-cla

Counter-claim—sec. 21, subd. 1a.

§ 44. When a creditor has a mortgage, or p
real or personal property of the debtor, or a lien
for securing the payment of a debt owing to him
debtor, he shall be admitted as a creditor only
balance of the debt, after deducting the value
property, to be ascertained by agreement betw
and the assignee, or by a sale thereof, to be mad
manner as the court shall direct; or the creditor
lease or convey his claim to the assignee, upon su
erty, and be admitted to prove his whole debt
value of the property exceeds the sum for whic
held as security, the assignee may release to the
the debtor's right of redemption thereon on r
such excess; or he may sell the property, subje
claim of the creditor thereon, and in either cas
signee and creditor respectively shall execute s
and writings necessary or proper to consumm
transaction. If the property is not sold or relea
delivered up, the creditor shall not be allowed
any part of his debt.

Incumbered property—power of assignee over, sec. 21, su

§ 45. No creditor proving his debt or claim sh
allowed to maintain any suit at law or in equity
against the debtor, but shall be deemed to have
all right of action and suit against him, and all
ings already commenced, or unsatisfied judgm

ready obtained thereon, shall be deemed to be discharged and surrendered thereby; *provided*, that no valid lien existing in good faith thereunder shall be thereby affected; *and further provided*, that a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the debtor where a discharge has been refused, or the proceedings have determined without a discharge. And no creditor whose debt is provable under this act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor, or any creditor, or of the assignee, be stayed to await the determination of the court in insolvency on the question of discharge; *provided*, there be no unreasonable delay on the part of the debtor, or of the petitioning creditors, as the case may be, in prosecuting the case to its conclusion; *and provided, also*, that if the amount due the creditor is in dispute, the suit, by leave of the court in insolvency, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proven in insolvency, but execution shall be stayed as aforesaid; *provided further*, that where a valid lien or attachment has been acquired or secured in any such action, and an undertaking been offered and accepted in lieu of such lien or attachment, the case may be prosecuted to final judgment for the purpose of fixing the liability of the sureties upon such undertaking; but execution against the insolvent upon such judgment shall be stayed.

Discharge—sec. 48 *et seq.*

Undertaking to prevent attachment—and to release same, see Code Civ. Proc. secs. 540, 555 and notes.

Stay of execution—see Code Civ. Proc. sec. 681a.

§ 46. Any person who shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim, on account of which the preference was made or given; nor shall he receive any dividend thereon until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

Fraudulent preferences and transfers—sec. 55.

§ 47. The court may, upon the application of the assignee, or of any creditor of the debtor, or without any

CODE CIV. PROC.—56.

application, before or after adjudication in insolvency, to examine upon oath the debtor in relation to his property and his estate, and any person tendering or making claims, and may subpoena witnesses to give evidence relating to such matters. All examinations of witnesses shall be had and depositions shall be taken in accordance with and in the same manner as is provided by the rules of Civil Procedure.

Subpoena—see Code Civ. Proc. sec. 1985 *et seq.*

Examination of witnesses—general rules, Code Civ. Proc. sec. 1985; rights and duties of witnesses, sec. 2064 *et seq.*

Depositions—Code Civ. Proc. secs. 2019-2038.

ARTICLE VII.

DISCHARGE.

§ 48. At any time after the expiration of three months from the adjudication of insolvency, the debtor may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given to the creditors, who have proved their debts, to appear, or to be appointed for that purpose, and show cause why a discharge should not be granted to the debtor; said notice shall be given by mail and by publication at least once a week, for four weeks, in a newspaper published in such county, or, if there be none, in a newspaper published in the nearest such county; *provided*, that if no debts have been proven, such notice shall not be required.

Service by mail—of notice to creditors, compare sec. 7n.

§ 49. No discharge shall be granted, or if granted shall be valid, if the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, or statement, or upon any examination in the course of the proceedings in insolvency, in relation to any matter concerning his estate, or his debts, or to any other material fact; or if he has concealed any part of his property, or effects, or any books or writings relating thereto, or if he has been guilty of fraud or willful neglect in the custody, or delivery to the assignee of the property, or if he has caused or permitted any loss or destruction of property, or if, within one month before the commencement of the proceedings, he has procured his lands, goods, or chattels to be attached, or seized on execution;

has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate, or if, having knowledge that any person has proven such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if being a merchant or tradesman he has not, subsequently to the passage of this act, kept proper books of account; or if he or any other person on his account, or in his behalf, has influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has in contemplation of becoming insolvent made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of fraud contrary to the true intent of this act; or in case of voluntary insolvency has received the benefits of this or any other act of insolvency or bankruptcy within three years next preceding his application for discharge. And before any discharge is granted, the debtor shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act, as ground for withholding such discharge or as invalidating such discharge, if granted.

Books of account—see as to effect of failure to deposit, sec. 22a.

Fraudulent preferences and transfers—sec. 53 and notes.

Fraud—generally, Civil Code, sec. 3441; 2 Cal. 107, 269, 326; 5 Cal. 161; 6 Cal. 47, 664, 670; 7 Cal. 206; 8 Cal. 87; 12 Cal. 45, 281; 13 Cal. 76; 19 Cal. 307; 21 Cal. 402; 25 Cal. 653; 26 Cal. 309; 35 Cal. 223; 37 Cal. 323; 49 Cal. 620; 50 Cal. 132; fraudulent intent, Civil Code, sec. 3442; 7 Cal. 391, 503; 8 Cal. 118, 12 Cal. 45; 14 Cal. 165; 24 Cal. 502; 36 Cal. 159; 42 Cal. 361; 43 Cal. 581; 48 Cal. 399; 50 Cal. 132: penalty, sec. 56.

§ 50. Any creditor opposing the discharge of a debtor shall file specifications, in writing, of the grounds of his

opposition, and after the debtor has filed and served answer thereto, which pleadings shall be verified, the court shall try the issue or issues raised, with or without a jury, according to the practice provided by law in such actions.

Opposition to discharge—for defects of petition or schedule—337; 32 Cal. 406; by creditor not named, 4 Cal. 337; fraud, settlement, facts, 37 Cal. 354; 39 Cal. 123.

Verification of pleadings—see Code Civ. Proc. sec. 446 and 447.

Conduct of trial—in civil actions, see Code Civ. Proc. sec. 605.

§ 51. If it shall appear to the court that the debtor has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof to a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall issue him a certificate thereof, under the seal of the court, in substance as follows: In the Superior Court, County of —, State of California. Whereas, — has been duly adjudged an insolvent under the insolvent laws of this State, and appears to have conformed to the requirements of law in that behalf, it is therefore ordered by the court that said — be forever discharged from all debts and claims, which by said insolvent laws are provable against his estate, and which existed on the day of —, on which the petition for adjudication was filed by [or against] him, excepting such debts, if any, which are by said insolvent laws excepted from the operation of a discharge in insolvency. Given under my hand and the seal of the court, this — of —, A. D. 18—, —, Clerk. [Seal.] —, Judge.

§ 52. No debt created by fraud or embezzlement, or by the debtor, or by his defalcations as a public officer, or acting in a fiduciary character, shall be discharged under this act, but the debt may be proved, and the discharge thereon shall be a payment on account of said debt. No discharge granted under this act shall release the debtor from any charge, or affect any person liable for the same contract, or with the debtor, either as partner, joint contractor, indorser, surety, or otherwise.

Fiduciary character of debt—prevents discharge, 46 Cal. 500.

§ 53. A discharge, duly granted under this act, shall, with the exceptions aforesaid, release the debtor from all claims, debts, liabilities, and demands, set forth in the schedule, or which were or might have been provable against his estate in insolvency, and may be pleaded in simple averment, that on the day of its date such

charge was granted to him, setting forth the same in full, and the same shall be a complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be *prima facie* evidence in favor of such fact, and of the regularity of such discharge; *provided, however*, that any creditor of said debtor, whose debt was proved or provable against the estate in insolvency, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, and who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same, or if the same shall have been pleaded, the effect thereof may be avoided collaterally upon any such grounds.

Decree of discharge—effect of, 14 Cal. 173; 17 Cal. 518; 34 Cal. 98; when no defense, 26 Cal. 279; 38 Cal. 196.

Attacking discharge—41 Cal. 123.

§ 54. The refusal of a discharge to the debtor shall not affect the administration and distribution of his estate under the provisions of this act.

ARTICLE VIII.

FRAUDULENT PREFERENCES AND TRANSFERS.

§ 55. If any person being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment or seizure, having reasonable cause to believe that such person is insolvent, and that such attachment, seizure, payment, pledge, conveyance, transfer, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of or to evade any of the provisions of this act, such transfer, payment, conveyance, pledge, or assignment is void, and

the assignee may recover the property, or the value of, as assets of such insolvent debtor; and if such assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

Fraudulent preferences and transfers—Civil Code, secs. Cal. 488; 10 Cal. 227, 269; 12 Cal. 281; 13 Cal. 62; 19 Cal. 41; 21 Cal. 194; 23 Cal. 233, 514; 34 Cal. 36, 100; 35 Cal. 223, 302; 37 Cal. 239, 545; 42 Cal. 361; 49 Cal. 620; 51 Cal. 521; 53 Cal. 197.

Assignments for benefit of creditors—Civil Code, secs. Cal. 107; 3 Cal. 471; 5 Cal. 210; 8 Cal. 152; 10 Cal. 269, 274; 12 Cal. 450; 41 Cal. 566.

ARTICLE IX.

PENAL CLAUSES.

§ 56. From and after the taking effect of this article, any debtor or insolvent shall, after the commencement of proceedings in insolvency, secrete or conceal any property belonging to his estate, or part with, conceal, destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof, with intent to prevent it from coming into the possession of his assignee in insolvency, or to hinder, impede, or defraud the assignee in recovering or receiving the same, or making payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate, with like intent to defraud, willfully and fraudulently conceal, or shall spend any part thereof in gaming; or shall schedule any property or effects whatsoever; or if he has any person having to his knowledge or belief a claim against his estate, he shall disclose the same to his assignee within one month after the commencement of proceedings in insolvency, or attempt to account for any of his property by fictitious claims or expenses; or shall, within three months before the commencement of proceedings in insolvency, under a false pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels, with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in insolvency, pawn, pledge, or dispose of otherwise than in the ordinary way of his trade, any goods or chattels which have been obtained on

and remain unpaid for, he shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than three months nor more than two years.

Concealing property, etc.—see Penal Code, sec. 154.

Fraudulent dealing with books or writing—see Penal Code, sec. 122.

Fraud—sec. 49a; 19 Cal. 143.

Fraudulent preferences and transfers—sec. 55n.

ARTICLE X.

MISCELLANEOUS.

§ 57. If any debtor shall die after the order of adjudication, the proceedings shall be continued and concluded in like manner and with like validity and effect as if he had lived.

Continuance of proceedings—after death of party, compare Code Civ. Proc. sec. 385.

§ 58. Pending proceedings by or against any person, copartnership, or corporation, no Statute of Limitations of this State shall run against a claim which in its nature is provable against the estate of the debtor.

Limitations generally—see Code Civ. Proc. sec. 312n.

§ 59. Any creditor, at any stage in the proceedings, may be represented by his attorney or duly authorized agent.

Attorney—see Code Civ. Proc. sec. 275 *et seq.*

§ 60. It shall be the duty of the court having jurisdiction of the proceedings, to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution; and also a homestead in the manner as provided in section one thousand four hundred and sixty-five of the Code of Civil Procedure.

Property exempt from execution—see Code Civ. Proc. sec. 690 and notes.

§ 61. The filing of the petition by or against a debtor upon which an order of adjudication in insolvency may be made by the court, shall be deemed to be the commencement of proceedings in insolvency under this act.

§ 62. Words used in this act in the singular include the plural, and in the plural, the singular, and the word "debtor" includes partnerships and corporations.

Meaning of words—compare Code Civ. Proc. sec. 17.

§ 63. A receiver may be appointed by the court in which an insolvent proceeding is pending before the appointment of an assignee:

1. Upon the application of creditors, where it appears that the property, or any portion thereof, is in danger of being lost, removed, or materially injured;

2. In all other cases where receivers are appointed by the court, the usages of courts of equity. And thereupon the appointment, oath, undertaking, and powers of such receiver shall, in all respects, be regulated by the general law of the State applicable to receivers.

Receivers—see Code Civ. Proc. sec. 564 *et seq.*

§ 64. All sections of the Code of Civil Procedure of the State of California relating to contempt are made applicable to all proceedings under this act. An appeal shall be allowed to the Supreme Court from any order adjudging any person guilty of contempt.

Contempts—secs. 1209-1222, 907-910; also secs. 178, 183, 1016
Appeal to Supreme Court—sec. 67.

§ 65. When an attachment has been made and is dissolved before the commencement of proceedings in insolvency, or is dissolved by an undertaking given by the defendant, if the claim upon which the attachment was commenced is proved against the estate of the debtor, the plaintiff may prove the legal costs and disbursements of the suit, and of the keeping of the property, the amount thereof shall be a preferred debt. In contested matters in insolvency the court may, in its discretion, award costs to either party, to be paid by the debtor or to either or both parties, to be paid out of the estate, as justice and equity may require; in awarding costs the court may issue execution therefor. In all insolvency cases under this act, the court shall allow the petitioner and creditors out of the estate of the debtor, if any action of insolvency be made, as a preferred claim, the legal costs and disbursements incurred by them in the proceedings in half.

Attachment—see Code Civ. Proc. sec. 537 *et seq.*

§ 66. The court may, upon the application of the petitioner or, if it be a voluntary petition, or of the petitioners, if a creditor's petition, dismiss the petition and continue the proceedings at any time before the appointment of assignee; after the appointment of assignee, dismissal shall be made without the consent of all interested in or affected thereby.

§ 67. An appeal may be taken to the Supreme Court in the following cases:

1. From an order granting or refusing an adjudication of insolvency;
2. Allowing or rejecting a creditor's claim, in whole or in part;
3. Overruling a motion for a new trial;
4. Settling an account of an assignee;
5. Against or in favor of setting apart homestead or other property claimed as exempt from execution;
6. Granting or refusing a discharge to the debtor.

The notice, undertaking, and procedure on appeal shall conform to the general laws of this State regulating appeals in civil cases, except that when the assignee has given an official undertaking and appeal from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable on such undertaking.

Appeal in contempt cases—sec. 64.

Appeals—in general, see Code Civ. Proc. secs. 936-959; notice, see Code Civ. Proc. sec. 940 and note; undertaking, see Code Civ. Proc. secs. 940, 941, and notes.

Official undertaking—in lieu of usual bond, compare Code Civ. Proc. sec. 965.

§ 68. All acts and parts of acts in conflict with the provisions of this act are hereby repealed; *provided, however*, that such repeal shall in no manner invalidate or affect any case in insolvency instituted and pending in any court prior to the day when this act shall take effect.

Repeals—see Code Civ. Proc. sec. 18a.

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INDEX.

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INDEX.

[The references are to the sections.]

- Abatement**—action not to abate by death or other disability, § 385.
action not to abate by transfer, 385.
of nuisance, action for, 731.
- Abbreviations**—use of, 186.
- Absence**—at trial waives jury, 631.
from State, effect on Statute of Limitations, 351.
publication of service on, 413.
of evidence, ground for continuance, 595.
of witness, deposition may be taken, 2020.
- Absentee**—appointment for, in probate proceedings, 1718.
- Abstract**—in partition suits, 800.
costs for, when allowed, 799.
to be verified, 800.
by executors and administrators, 1622-1653.
- Accident**—a ground for new trial, 657.
- Account**—copy of, may be demanded, 454.
how stated in pleadings, 454.
items of, need not be pleaded, 454.
further account may be ordered, 454.
reference on judgment by default, 585.
reference, and trial by referees, 639.
to be rendered by special administrator, 1417.
to be rendered by persons trusted with estate, 1461.
to be rendered by surviving partner, 1585.
in case of executors and administrators, 1636.
final account of, 1652.
proceedings in case of neglect to render, 1653.
order to, may issue against public administrator, 1735.
of public administrator, when to be made, 1739.
of joint guardian may be allowed, 1775.
- Accounting and settlements**—action for, for rents pending redemption, 707.
See EXECUTORS AND ADMINISTRATORS.
- Accrued right**—not affected by Codes, 8.
- Acknowledgments**—judicial officers may take, 179.
- Act**—See CODE OF CIVIL PROCEDURE.
- Action**—Code not to effect pending, 8.
definition of, 22.
are of two kinds, 24.
one form of, only, of civil action, 307.
against husband and wife, when wife may defend alone, 371.
does not abate by death, etc., 385.
against executors and administrators, 1582, 1584.
against joint debtors, 939-994.
against steamers, boats, and vessels, 813-827.
- CODE CIV. PROC.—57. [673]

Action—Continued.

- against sheriff for official acts, 1055.
- against sureties on arrest and bail, 490.
- against two or more, proceedings thereon, 414.
- arbitration revoking submission to, 1290.
- between husband and wife, 370.
- by whom prosecuted, 30, 367.
- by assignee, 368.
- by executors and administrators, 1583, 1590.
- by father or mother, for injury or death of child, 378.
- by father or mother, for seduction of daughter, 375.
- by guardian, for injury or death of ward, 378.
- by guardian, for seduction of ward, 375.
- by guardian, for property of ward, 1769.
- by purchaser, at sheriff's sale after eviction, 708.
- by receiver, 568.
- by representative, for death of person, 377.
- by State, 446.
- by surety, to compel satisfaction of a debt, 1050.
- by unmarried female, for seduction, 374.
- by whom prosecuted, 30.
- commencement of, 350, 405.
- consolidation of, 1048.
- causes of, which may be united, 427.
- continuance in case of death, etc., 385.
- costs, when allowed in, 1022-1039.
- costs, when several actions are united, 1023.
- depositions in, 2020, 2021.
- dismissal of, 581.
- for condemnation of lands, proceedings in, 1243-1263.
- for damages against defaulting witness, 1992.
- for damages for usurpation of office or franchise, 807.
- for death or injury, who may sue, 376, 377.
- for delivery of personal property, 509-521.
- for foreclosure, form of, 726-728.
- for foreclosure of liens, 1191-1199.
- for libel and slander, 460.
- for liens may be consolidated, 1196.
- for nuisance, 731.
- for partition of real property, 752-797.
- for recovery of estate sold by guardian, 1806.
- for determining conflicting claims to real property, 738-7
- for seduction, who may sue, 374, 375.
- for trespass on realty, 733, 1583.
- for usurpation of office or franchise, 802-810.
- for waste, 732, 1583.
- form of, 307.
- guardian power to bring, 1769.
- includes special proceedings, 363.
- in Justices' Courts, 839-850.
- how commenced, 405.
- limitation of action on guardian's bond, 1805.
- limitation of, for recovery of estate sold, 1806.
- limitation of actions, 312-362.
- limitations in other than real actions, 335-348.
- limitations of actions for vacating sales, 1573.
- limitation of, how affected by Code, 9.
- limitation of, on preferred claim for wages, 1206.
- manner of commencing, 407-412.
- may be retried on failure of verdict or discharge of jury, 579.
- may proceed after judgment against one of several defen
- on undertaking in provisional remedies, 552.

Action—Continued.

- on undertaking after dismissal, 581.
- on submission to arbitration revoked, 1290.
- on bond of administrator, by coadministrator, 1536.
- on bond of guardian, 1804.
- parties in, how designated, 308.
- parties to, 357-389.
- pendency of—notice, when given, 409, 755.
- pending, when deemed, 1049.
- pending, ground for demurrer, 430.
- people not required to give bonds in, 1058.
- personal, may be had for lien of labor, etc., 1197.
- place of trial of, 392-400.
- place of trial, change of, 397-400.
- pleading in, 420-476.
- postponement of trial of, 595.
- questions of fact not in issue, how tried, 309.
- reassignment and transfer of, in Justices' Courts, 90.
- register of, to be kept by clerk, 1052.
- State not required to give bonds in, 1058.
- successive actions on same contract, 1047.
- summons in, 407-416.
- testimony, when to be taken by clerk, 1051.
- time of commencement of, 312-362.
- to be prosecuted by real party in interest, 367.
- to compel an accounting for rents and profits, 707.
- to determine adverse claims to real property, 738-748.
- to determine adverse claims, 1050.
- to quiet title, 738.
- to redeem from judicial sale, 346.
- transfer of the Justices' Courts, 90.
- trial of, 600-645.
- who may appear in, in Justices' Courts, 842.

Action, causes of—joinder of, 427.

- successive, on same contract, 1947.

Actions—in Justices' Courts, how entitled, 89.

- appearance in, 842.
- arrest of defendant in, 861-865.
- attachment, when may issue, 866-869.
- claim and delivery, proceedings in, 870.
- how commenced, 839-850.
- pleadings in, 851-859.
- place of trial, 832-838.
- place of trial, change of, 832.
- proceedings after change of venue, 836.
- provisions of Code applicable, 925.

Acts—of foreign executive, as evidence, 1918.

- of municipal corporation, as evidence, 1918.
- declaration of party, as evidence, 1570.

Adjournment—for term for absence of judge, 139.

- till next regular session, 140.
- of Superior Court, when, 74.
- in absence of jury, from time to time, 617.
- of Supreme Court, 46.
- testimony may be taken by deposition on, 596.
- to non-judicial day, effect of, 135.
- in contesting certain elections, 1121.

Adjutant-general—see NATIONAL GUARD.**Administration—of estate, to whom granted, 1365.**

- who disqualified, 1369.

Administration—Continued.

when may be summary, 1469.
of oaths and affirmations, 2093-2097.

Administrator—costs in actions by or against, 1031.

may sue alone in his legal capacity, 369.
may sue for death or injury of person, 377.
may be excused from giving bond on appeal, 946.
to render account to Superior Court, 1622.
powers of, may be suspended, 1436.

See EXECUTORS AND ADMINISTRATORS, SPECIAL ADMINISTRATORS.

Admission—of attorney to practice, 275-280.

by failure to verify answer, 446.
of fact, to avoid postponement, 595.
of genuineness of instrument by failure to verify answer, 448.
of genuineness of instrument by plaintiff, 448.
of service of summons, 415.
when genuineness of instrument not admitted, 449.

Adverse claim—to real property, action to determine, 738.

to personal property, action to determine, 1050.

Adverse party—on appeal, who is, 938.

in intervention, 385.
when notified to produce written instrument, 1938.

Adverse possession—by actual occupation, 824.

occupation under written instrument, when deemed, to legal title, must be shown, 323.
what constitutes, under Statute of Limitations, 325.
judgment under, 322.
written instrument under, 322-323.
written instrument not under, 324.
effect of relation of landlord and tenant, 326.
right of possession not impaired by descent cast, 327.

Affidavits—definition of, 2003.

may be used, for what, 2009.
before whom to be taken, 179, 259, 2012.
before whom taken within United States, 2013.
before whom taken in foreign country or state, 2014.
certificate required to foreign affidavit, 2015.
certificate required in another State, 2013.
defective heading, 1046.
for arrest of judgment debtor, 715.
for attachment, what to state, 538.
for a contempt, 1211.
for an injunction, 527.
for judgment by confession, 1133.
for mandate, requisites of, 1066.
for prohibition, 1103.
for order to allow amendment, 473.
for order of arrest, 481.
for order of arrest in Justices' Court, 862.
for order to examine imprisoned witness, 1996.
for postponement of action, 595.
for postponement in Justices' Courts, 876.
for publication of summons, 412.
for publication in partition suits, 757.
for review, when and by whom made, 1069.
for submitting controversy without action, 1138.
in proceedings to contest election, 1115.
in proceedings to contest administrator's bond, 1394.
in proceedings against joint debtors, 991.

Affidavits—Continued.

- in proceedings to try right of office, 804.
 - in proceedings to perpetuate testimony, 2064.
 - in replevin where delivery is claimed, 510.
 - juror may make, as to misconduct of jury, 657.
 - may be taken by judicial officers, 179.
 - of concealment or materiality of witness, 1968.
 - of costs and disbursements, 1033.
 - of justification of bail, 495.
 - of mariners' claim of wages, 625.
 - of notice of filing award, 1286.
 - of plaintiff denying execution of instrument, 448.
 - of printer, evidence of publication, 2010.
 - of property due judgment debtor, 717.
 - of sole trader, 1818.
 - of service and mailing of notices, 1306.
 - of return of summons, 410.
 - of service of summons, 415.
 - of sureties on bonds, 1057.
 - of publication, what to specify, 2010.
 - of publication, where filed, 2011.
 - of title to property claimed by third party, 519.
 - of witness for exoneration from contempt, 2069.
 - on application for writ of review, 1069.
 - on application for injunction, 526, 527.
 - on application to perpetuate testimony, 2064.
 - on claim and delivery, 510.
 - on motion for continuance, 595.
 - on motion to dissolve injunction, 532.
 - on motion for a new trial, when to be filed and served, 656.
 - on objections to appointment of referee, 642.
 - on submission of controversy, 1138.
 - service of copy, in arrest, 434.
 - service of, in replevin, 512.
 - service of, in injunction, 527.
 - to accompany summons against judgment debtor, 991.
 - to be filed by sheriff in replevin, 520.
 - to bill of costs, 1033.
 - to compel judgment debtor to answer, 715.
 - to copy of assignment to redemptioner, 705.
 - to discharge attachment, 556.
 - to oppose discharge of attachment, 557.
 - to oppose dissolution of injunction, 532.
 - to petition to obtain further security from administrator, 1397.
 - to show misconduct of jury, 658.
 - to vacate order of arrest, 503.
 - verifying pleadings, 446.
 - when affiant is non-resident, 446.
 - when affiant is a corporation, 446.
 - when State is a party, not required, 446.
 - when valid though defective, 1046.
 - when may be used, 2009.
- Affinity—disqualifies judge, 170.**
 disqualifies juror, 602.
 disqualifies referee, 641.
- Affirmation—equivalent to oath, 2097.**
 oath includes, 17.
- Agent—appointment of, to take property on distribution, 1691.**
 to furnish bond in such case, 1692.
 liability of, on bonds, 1695.
 to render annual account to Probate Court, 1694.
 declarations of, 1870.

- Alien**—effect of alienage on limitation of actions, 354.
- Alienation**—after suit commenced, effect of, in real actions, 740, 747.
- Allegations**—affirmative, by whom must be proved, 1869.
 denials of, how made, 437.
 if not controverted, deemed admitted, 462.
 in complaint for injunction, what essential, 526.
 in pleadings against joint debtors, 993.
 sham and irrelevant to be stricken out, 453.
 material, what are, 463.
 material only need be proved, 1867.
 negative, when must be proved, 1869.
 to be liberally construed, 452.
 redundant, striking out, 453.
 when deemed admitted, 462.
 when deemed controverted, 462.
 burden of proof of, 1869, 1981.
 variance, 469-471.
- Allowance**—for support of family of decedent, 1464, 1467.
 how to be paid, 1467.
- Alteration**—in writing must be accounted for, 1982.
- Ambiguity**—as a ground for demurrer, 430.
 grounds of demurrer to answer, 444.
- Amendments**—after demurrer filed, 472.
 by adding or striking out party, 473.
 by correcting name of party, 473.
 must be filed and served, 432.
 of course, 472.
 of process, 128.
 terms may be imposed, 473.
 to complaint, when allowed, 464.
 to complaint, service of, 432.
 to pleadings or proceedings generally, 473.
 to pleadings in Justices' Courts, 859.
 upon affidavit and notice, 473.
 errors and defects to be disregarded, 475.
 fictitious name, where real name discovered, 474.
 service of, 432, 472.
 supplemental pleadings, 464.
 variance, 469-471.
- Amicable actions**—1138-1140.
- Another action pending**—ground for demurrer, 430.
- Answer**—as a pleading, 422.
 amendment, when allowed, 464-472.
 as an appearance, 1014.
 by whom verified, and form of verification, 446.
 construction of, 452.
 copy of instrument in, effect of pleading, 448.
 cross-demands in, 440.
 counter-claim in, 438-440.
 defenses in, must be separately stated, 441.
 demanding items of account, 454.
 defenses not raised by, waived, 434, 439.
 demurrer at same time with, 431.
 demurrer to, 442-444.
 denials in, 437.
 disclaimer, 739.
 effect of omission to set up counter-claim in, 856.
 effect of demurrer on answer, 472.
 errors and defects in, 475.

Answer—Continued.

- heading to, defective, 1046.
- estoppel, 1908, 1962.
- extension of time for filing, 473, 1054.
- gold coin, etc., 667.
- husband and wife, 370-371.
- improvements, setting up value, 741.
- injunction after, 528.
- intervention, to complaint on, 387.
- in cases for contempt, 1217.
- in contest on probate, 1312.
- in libel and slander suits, 461.
- in partition suits, 758.
- in actions to quiet title, 739.
- in actions against steamboats and vessels, 821.
- in actions in Justices's Courts, 855, 856, 860.
- in action of claim and delivery, 667.
- irrelevant or redundant matter in, 453.
- in proceeding relative to escheated estates, 1271.
- issue raised by, 588.
- issue of fact raised by, 590.
- joint debtors, in proceedings after judgment, 992.
- judgment on failure to, 585.
- lost, how supplied, 1045.
- material allegations, what are, 463.
- may be made to part of complaint, 441.
- may be filed with demurrer, 431.
- may contain several defenses, 441.
- must be verified, when, 446.
- must be filed, 465.
- must be served, 465.
- new matter in, 437.
- new matter deemed controverted, 462.
- of joint debtors, after judgment, 992.
- of attorney to accusation, 296.
- pleading judgment, 456.
- pleading conditions precedent, 457.
- pleading Statute of Limitations, 458.
- pleading a private statute, 459.
- supplemental, defined, 464.
- sham, may be stricken out, 453.
- signature to, 446.
- time of filing, 407, 472.
- time to file may be granted, 473, 1054.
- to application for mandate, 1089.
- to amended complaint, 432, 860.
- to cross-complaint, 442.
- to be filed on demurrer overruled, 472.
- to complaint on written instrument, 447.
- to mandamus, 1089, 1094.
- waiver, by failure to object, 434.
- waiver of summons by, 406.
- what to contain, 437.
- want of verification, what admits, 446.
- when may be stricken out, 453.
- when omission waives counter-claim, 439.
- where complaint sets forth instrument, 447-449.

Appeals to Supreme Court—in what cases from a Superior Court, 963.

- in what cases from a Justice's Court, 964.
- by executors and administrators, 965.
- from their acts, where appointment vacated, 966.
- in probate, matters to be taken within sixty days, 1715.
- when appellate court may order payment of costs, 1730.

Appeals to Supreme Court—Continued.*General provisions.*

- aggrieved party may take, 938.
- appellant, who may be, 938.
- appeal from award, 1289.
- certificate of clerk to transcript, 953.
- costs on, how claimed, 1034.
- decision or verdict not supported by evidence, 939.
- dismissal, when and when not allowed, 954.
- dismissal, effect of, 955.
- effect on attachment, 946.
- eminent domain, 1257.
- exceptions necessary, 646, 956.
- from what may be taken, 939.
- from order granting or refusing new trial, 939.
- from judgment on controversy without action, 1140.
- from judgment for delivery of documents, 943.
- from judgment for executing conveyance, 944.
- from judgment for sale or delivery of real property, 945.
- from judgment, papers to be used on, 950.
- from order, papers to be used on, 951.
- from order granting or refusing new trial, papers to be used, 952.
- from judgment, what may be reviewed, 956.
- how taken, 936-950.
- judgment on, from agreed case, 1140.
- judgment, interlocutory orders reviewable, 956.
- judgments and orders not final, when may be appealed from, 936.
- justification of sureties, proceedings thereon, 948.
- mode of taking, 940.
- modifying judgment on, 957.
- notice, time for cannot be extended, 940.
- orders out of court without notice, how reviewed, 956.
- parties, how designated, 938.
- papers on, how certified, 953.
- remedial powers of appellate court on, 957.
- remittitur to be certified to court below, 958.
- reversal on, 957.
- review on, 936-939.
- stay of proceedings, when effected, 942, 946.
- suggestion, death or other disability on, 385.
- undertaking on, 941.
- undertaking to stay proceedings, 942.
- undertaking may be in one or several instruments, 947, 948.
- undertaking in cases not specified, 949.
- undertaking justification of sureties, 948.
- undertaking on, money judgment, 942.
- undertaking on, real property, 945.
- undertaking, several documents in, 947.
- undertaking, liability of sureties, 1059.
- undertaking, trustees and representatives as appellants, within what time to be taken, 946.

Appeals to Superior Courts—from Justices' or Police Courts, 974.

- on questions of law, statements required, 975.
- on questions of fact, or law of fact, 976.
- transmission of papers to appellate court, 977.
- undertaking on and qualification of sureties, 978.
- stay of proceedings on, 979.
- powers of Superior Court on, 980.
- notice on, 974.
- transcript on, 977.
- statement, when required, 975.
- statement, when not necessary, 976.

Appeals to Superior Courts—Continued.

trial *de novo*, when, 976.

judgment on, 980.

fees on, 980.

Code sections, 936-958, not to apply to, 959.

Appearance—accusation against attorney to, 293.

husband and wife, 370, 371.

time for, to be inserted in summons, 407.

waives service of summons, 406, 416.

by demurrer or answer, 1014.

failure of, waives findings, 634.

failure of, waives jury, 631.

failure of, in Justices' Courts, 884.

of parties, is waiver of notice, 1306.

waives issuance of summons, 406.

what constitutes, 1014.

Appellant—must file undertaking, 941.

executors and administrators, when need not file, 946.

must furnish papers, 950.

what to furnish, on appeal from order, 951.

what to furnish, on order for new trial, 952.

who is, 938.

Appellate jurisdiction—of Supreme Court, 50, 52.

of Superior Court, 75, 77.

Application—to court, repetition prohibited, 182.

repetition, a contempt, 183.

Appraiser—may be appointed at chambers, 166.

to be appointed by Superior Court, 1444.

who are, and by whom appointed, 1444.

to be sworn, 1445.

duty of, 1445.

appointment, what to include, 1445.

inventory to be signed by, 1449.

of after-discovered property, 1451.

duty of, as to homestead, 1476.

report of, on homestead, 1477.

report, how confirmed, 1478.

appointment of, on estate of ward, 1773.

Appraisal—of estates of deceased, 1444, 1476.

of ward's estate, 1773.

Arbitration—what may be submitted to, and when, 1281.

titles cannot be submitted, 1281.

submission to be in writing, 1282.

submission entered as order of court, 1283.

revocation of, 1283.

powers of arbitrators, 1284.

adjournments, 1284.

oath of arbitrators, 1285.

power to administer, 1284.

majority may decide question, 1285.

arbitrators must be sworn, 1285.

must all meet, 1053.

but two acting is sufficient, 1053, 1285.

award must be in writing, 1286.

judgment on award, when entered, 1286.

grounds for vacating award, 1287.

award vacated in certain cases, 1287.

court may modify or correct awards, 1288.

decision on motion subject to appeal, 1289.

Arbitration—Continued.

judgment, when not subject to appeal, 1239.
 if submission to, is revoked, measure of damages, 1239.

Argument—case reserved for, when to be brought up, 665.
 order of, on trial, 607.

Arrest and bail—affidavit for order of, 481.

affidavit in Justices' Courts, 862.
 arrest, how made, 485.
 bail by defendant, 486.
 bail, allowance of, 496.
 bail, allowance of, on arrest for contempt, 1215.
 bail, how given, 487.
 bail may be reduced, 503, 504.
 bail, liability of, 490.
 bail, substituted for deposit, 499.
 certificate of judge or clerk, sufficiency of, 496.
 custodian of will, when subject to, 1302.
 deposit to secure discharge, 497.
 deposit, when to be refunded, 500.
 deposit to be paid into court, 498.
 deposit applied on judgment, 500.
 discharge, how effected, 486.
 escape, liability of sheriff, 501.
 execution in action on, what to state, 682.
 exoneration of bail by death, 491.
 exoneration by rearrest, 488.
 for refusal to obey citation in probate matters, 1460.
 for refusal of administrator to answer on oath, 1440.
 for forcible entry, when made, 1168.
 for contempt, arrest when, 1214.
 generally, 478-504.
 in what cases arrest may be made, 479.
 in probate proceedings, for embezzlement of estate, 1460.
 in Justices' Courts, proceedings on, 861-865.
 judgment against sheriff as bail, 502.
 justification of bail, 493-495.
 liability of officer for arrest of witness, when, 2069.
 law undertaking when required, 493.
 limitations of power of arrest, 478.
 notice of arrest to be given plaintiff in Justices' Court, 864.
 notice of justification of bail, 493.
 no arrest to be made except under Code, 478.
 of judgment debtor, 715.
 of usurper of office, when, 804.
 of public administrator, for refusal to submit to examination, 1734.
 order of arrest, from whom obtained, 480.
 order, form of, and return, 483.
 order, what to require, 483.
 order, when may be made, 483.
 order, execution of, 485.
 order, may be vacated, 503, 504.
 order, how served, 484.
 of witness for refusal to testify, 1994.
 of witness, when void, 2068.
 proceedings for, in Justices' Court, 861-865.
 proceedings against bail, 490.
 proceedings against sheriff, for escape, 502.
 qualifications of bail, 494.
 reduction of deposit, 497.
 release from, exempts from rearrest, 1153.
 sheriff, discharge of, liability, 496.
 sheriff to give certificate of deposit, 497.

Arrest and bail—Continued.

- sheriff, judgment against as bail, 502.
- sheriff, paying over money, 496.
- sheriff, return, etc., 492.
- sheriff liable on an escape, 501.
- surrender of defendant by bail, 488.
- usurper of office may be arrested, 804.
- undertaking of plaintiff, 432.
- undertaking of defendant for release, 492.
- vacating order of arrest, 503-504.
- witness, when exonerated from, 2067.
- witness, when entitled to discharge from, 2070.

See DISCHARGE FROM IMPRISONMENT.

Assault and battery—jurisdiction of Justices' Courts, 115.**Assessment—of value of property condemned, 1248.****Assignee—may sue, 368.****Assignment—of accounts, etc., 368.**

- of thing in action, 368, 385.
- not to prejudice right to set-off, 368.
- not to bar counter-claim in answer, 439.
- redemptor to produce copy of, 705.

Associates—may be sued by name of association, 368.**Attachment of property—generally, 551-559.**

- application for discharge of, 554-558.
- affidavit on, what to show, 538.
- affidavit in Justices' Court, 866.
- affidavit for discharge of, 557.
- applications for discharge of, 554.
- against steamers and vessels, 817-823.
- attorney to give instructions to sheriff, 543.
- balance after sale, how collected, 551.
- claim of third person, trial of rights, 549.
- discharge of, for irregularity, 556.
- discharge, application for, 554-556.
- discharge, affidavit on motion for, 557.
- discharge, certified copy of order may be recorded, 559.
- discharge, judgment for defendant, 553.
- discharge, undertaking on, 554.
- dissolution of, 554-558.
- defendant may be examined on oath, 545.
- effect of judgment for defendant, 553.
- examination of third persons and debtor, 545.
- execution of, 541-543.
- for contempt, 1212.
- form of, and requirements, 540.
- garnishee may be examined on oath, 545.
- in what cases issued, 537.
- in Justices' Courts, provisions to apply, 866-869.
- judgment, how satisfied, 550-551.
- judgment for defendant, 553.
- instructions to sheriff in writing, 543.
- inventory by sheriff, 546.
- issue of, not to be before summons, 537.
- liability of garnishee, 544.
- may be taken out for lien of labor, etc., 1197.
- memorandum to be furnished by garnishee, 546.
- of real property standing in defendant's name, 542.
- of real property on record in other name, 542.
- of ships, etc., 813-827.
- of personal property, 542.

Attachment of property—Continued.

- of stocks, and shares of stocks, 541.
- of debits and credits, 542.
- of credits in hands of third party, 544.
- property liable to, 541-543.
- property, third persons claiming, 549.
- property, in third person's hands, 543-544.
- property ordered to be sold, 547-548.
- proceeds of property, how applied, 550.
- released upon undertaking, 554.
- satisfaction of plaintiff's claim, 550.
- several writs simultaneous, 540.
- sheriff to make inventory, 548.
- sheriff may sell perishable property, 547.
- sheriff may collect debts, 547.
- sheriff to make return, 548, 559.
- time and manner of executing writ, 542.
- to be directed to sheriff, 540.
- undertaking, effect of, 539.
- undertaking on, successful defendant entitled to, 553.
- undertaking on, release of, 552.
- undertaking on, against steamers, 818.
- what wages are preferred claims, 1206.
- when, and what cases to issue, 537.
- what subject to attachment, 541, 542.
- when sheriff to return writ, 539.
- when to issue against steamers, 817-824.
- when to be discharged, 555, 558.
- when not to be discharged, in case of steamers, 835.
- writ of, requirements thereof, 540.
- writ, to whom directed from Justices' Court, 868.

Attachment of person—of witness, power of judicial officer, 177.

- for not producing will, 1302.
- to compel attendance, 1993.
- in probate proceedings, to compel attendance of executor, etc., 1440.
- of person cited to appear, 1460.
- of executor, etc., refusing to appear and render exhibit, 1827.

Attendance—of witnesses may be compelled, 177.

- of witnesses, how procured, 1983-1997.

Attorney—accusation against must be in writing, 290.

- accusation must be verified, 291.
- acts which subject him to contempt, 1209.
- admission to practice, how effected, 275.
- admission in Superior Courts, 276.
- admission in Supreme Court, 277.
- admission of, from other State, 279.
- answer to accusation, how made, 294-296.
- appointment for absentees in probate, 1718.
- appointment on contest of probate of will, 1307.
- appearance of, on day of trial, for removal, 293.
- authority of, 283.
- cannot be appointed receiver, when, 568.
- certificates of admission of, 277.
- change of, in actions, 284-285, 1718.
- citation, to answer accusation, 292.
- compensation of, 1021.
- contempt of court by, 1209.
- conviction for felony, effect of, 288.
- death or removal of, notice required, 286.
- declaration of intention, 275.

Attorney—Continued.

- duties of, 282.
- demurrer of, to accusation, 294.
- examination for admission, 276-279.
- exempt from jury duty, 200.
- fees of, 1021.
- general duties of, 282.
- in certain cases not to testify, 1881.
- in Justices' Courts, 842.
- justice, or judge may not act as, 170-171.
- judgment against on accusation, 299.
- license of, 277, 281.
- may instruct sheriff what to attach, 543.
- may require sheriff to take property in replevin, 511.
- may consent to waive jury, 631.
- may waive finding of facts, 634.
- measure and mode of compensation, 1021.
- must not be receiver, 566.
- name of, to be indorsed on summons, 497.
- notice of change of, in action, 285.
- oath of, on admission, 278.
- of other State, how admitted, 279.
- papers to be served on, 1015.
- practicing without license, a contempt, 281.
- pleadings to be signed by, 446.
- power of, 283.
- privileged communications of, 1881.
- proceedings for removal of, 287-289.
- qualifications necessary for admission, 275-276.
- reference on accusation against, 298.
- removal and suspension of, 286-289.
- roll of, to be kept, 280.
- service of papers on, to be made, 1015.
- striking off roll, 286-299.
- trial of, on accusation filed, 297.
- verification of accusation, 291.
- who may practice in Justices' Courts, 842.

- Attorney-general—duty of, in proceedings for escheated estates, 1272.**
- need not verify pleading, 446.
- may bring action for usurpation of office, 803, 804.

Awards—see ARBITRATION.

- Bail—defendant discharged on giving, 486.**
- deposit made instead of, 497.
- in contempts, 1215.
- justification of, 493-495.
- may be given by defendant on arrest, 487.
- may surrender defendant, 488.
- may arrest defendant, 489.
- may be exonerated, 491.
- may be examined as to qualifications, 495.
- qualifications of, 494.
- substituting for deposit, 499.
- to be given by usurper of office or franchise, 804.
- when charged on undertaking, 489.
- when finally charged, 490.
- when sheriff liable as, 501.
- on supplementary proceeding, 715.

- Bailiff of Supreme Court—how appointed, 265.**
- tenure of office, 266.

- Beneficiary—joinder of, as plaintiff, unnecessary, 369.**

- Bid**—at administration sale, how received, 1549.
 what amount to be bid, 1550.
 at execution sale, 694.
- Bidder**—refusal to pay bid at execution sale, 696-697.
 extent of liability, 697.
 when officer may refuse bid, 696.
 recovery from, 696.
- Bill of costs**—verification and filing of, 1033.
- Bill of exchange**—notice to drawers and indorsers, how construed, 1865.
 assignment of, 368.
 parties joined as defendants, 383.
- Bill of particulars**—obtaining, practice *o. a.*, 454.
 need not be pleaded, 454.
 complaint in Justices' Court may be, 853.
- Blank**—in process in Justices' Courts to be filled, 920.
- Boats**—liability of, liens for, 813.
 actions may be brought, 814.
 complaint, what to designate, 815.
 summons, how served, 816.
 attachment may issue, 817.
 issuance of writ, 818.
 writ, how directed, 819.
 execution of writ, 820.
 appearance and defense, 821.
 proceedings, how conducted, 822.
 discharge of attachment, terms of, 823.
 sale under judgment, 824.
 proceeds, how disposed of, 824.
 claims for wages preferred, 825.
 claims, how enforced, 825.
 claims, how proved, 826.
 notice of sale, 827.
- Bond**—of administrator, form and requisites of, 1388.
 additional, when required, 1389.
 separate bonds required, 1391.
 not void on first recovery, 1392.
 sureties must justify, 1393.
 additional security, 1394.
 when right ceases, 1396.
 when may be dispensed with, 1396.
 of administrator, with will annexed, 1426.
 of purchaser at administrator's sale, when required, 1567.
 action on administrator's bond, 1596.
 to executors by distributees of estate, 1661.
 suit upon distributees' bond, 1662.
 of agent appointed for absent distributees, 1662.
 of public administrator on special letters, 1727.
 of guardian, conditions of, 1754.
 of testamentary guardian, 1758.
 of guardian on sale of property, 1788.
 new bond of guardian, when required, 1803.
 must be filed, action on, 1804.
 provisions of Code to apply to, 1809.
 court commissioners may take, 259.
 qualifications of sureties, 1057.
 See UNDERTAKINGS, BAIL.
- Books**—containing laws presumed to be correct, 1900.
 entries in official, evidence, 1920.

- Books—Continued.**
 of science, art, etc., as evidence, 1936.
 of records of wills to be kept, 1318.
 judgment book to be kept, 668.
 judgment to be entered in amicable actions, 1132.
 inspection may be ordered and copy given, 1000.
- Breach of peace—jurisdiction in actions for, 115.**
- Buildings—proceedings to enforce liens on, 1183-1199.**
 what public, exempt from execution, 690.
- Burden of proof—on what it rests, 1981, 1982.**
- Calendar—causes to be entered on, by clerk, 593.**
- Capacity—want of, ground for demurrer, 430.**
- Case agreed—controversy without action, 1138-1140.**
- Causes of action—may be joined, 427.**
 must be separately stated, 427.
 where tried, 392-396.
 misjoinder of, ground for demurrer, 430.
 insufficiency of, ground for demurrer, 430.
 rights not waived by not demurring, 434.
 summons must contain statement of, 407.
- Certificate—of sale of personal property under execution, 698.**
 of sale of immovable personal property, 699.
 of sale of real property, 700.
 what must show, 700.
 duplicate to be filed, 700.
 of proof of lost will, 1340.
 of proof, to be attached to will, 1317.
 of service of summons, 415.
 of clerk to papers furnished on appeal, 953.
 of written law or public writing, for evidence, 1901.
 of copy of foreign judicial record, 1906, 1907.
 of copy of document, for evidence, 1919.
 of judicial record of States or United States, 1305.
 of sale of personal property, capable of delivery, 698.
 of sale of personal property incapable of delivery, 699.
 of sale of real property on execution, 700.
 of location of land as evidence, 1925.
 of purchase as evidence, 1925.
 of foreign justice to transcript of docket, 1922-1924.
 official, what to contain, 1923.
 official seal to be affixed to, 1923.
 on review, what to be certified, 1076.
 to transcript on appeal, 953.
- Certiorari—to be hereafter known as review, 1067.**
 generally, 1067-1077.
 See REVIEW.
- Cestui que trust—when not necessary to join as plaintiff, 369.**
- Challenges—peremptory, four allowed, 601.**
 grounds of, for cause, 602.
 for cause, how tried, 603.
 in Justices' Courts, 885.
- Chambers—power of supreme justices in, 165, 176.**
 of superior judge in, 166, 176, 1305.
 provisions for judges in, 144.
 all writs and orders may issue in, 106, 1103.
 writs may be made returnable in, 1103.

- Change—of parties, 335.**
 of place of trial, 397-399.
 of place of trial, Justices' Courts, 832-833.
- Change of names—application for, how made, 1276.**
 hearing application and remonstrance, 1278.
 jurisdiction in proceedings for, 1275.
 publication required, 1276.
- Change of place of trial—grounds for, 397.**
 where cause may be transferred to, 398.
 transfer of actions, affecting real estate, 400.
 costs on transfer, 399.
 in Justices' Courts, 833.
 on disability of justice, other justice may sit, 922.
 not to be changed more than once, 834.
 where cause must be transferred to, 835.
 proceedings on, in Justices' Courts, 836.
 effect of order of justice for, 837.
 transfer to Superior Court, 838.
- Charge to jury—what to contain, 606.**
 generally, 607, 608.
 further instructions, how given, 614.
- Chief justice—election and term of office, 40.**
 to assign justices, 43.
 to apportion business, 44.
 may convene court, 45.
 in case of absence, place how filled, 46
- Chose in action—assignment of, 368.**
- Citation—generally, 1707-1711.**
 to attorney to answer accusation, 292.
 to heirs resident in county, 1304.
 to executor named in will, 1304.
 to parties interested in estate, 1328.
 on contest of grant of letters, 1384.
 on justification of sureties in probate, 1394.
 on application for new sureties, 1398-1402.
 on application for release of sureties, 1403.
 service on absconding administrator, etc., 1439.
 service of summons on, 411.
 security not required in actions by, 1058.
 to person in charge of decedent's property, 1459-1461.
 to minor, by superior judge, 1749.
 to render an exhibit, 1623-1625.
 to render an account, 1628.
 time of service and return, 1711.
 when issued, 1708.
 how served, 1709, 1710.
- City—summons, how served on, 411.**
 need not give security in actions, 1058.
- Civil actions—arise from obligation or injury, 25.**
 when and how prosecuted, 30.
 by whom prosecuted, 30.
 pending rights not affected by Code, 8.
 for real property, limitation of, 315-328.
 may be consolidated on lien, 1196.
 how commenced, 405.
 when to be commenced, 312.
 when deemed commenced, 350.
 limitation of, against corporation, 359.

Civil actions—Continued.

limitation, where cause arises in other State, 361.
 how commenced in Police Courts, 929.
 questions involved in, may be submitted to arbitration, 1281.
 See **ACTIONS**.

Claims—by third person in replevin, 519.
 by third person in attachment, 549.
 by third person in execution, 689.
 of lienholder, when to be filed, 1187.
 for wages of mariner, preferred, 825.
 adverse, for personal property, 1050.
 adverse, for real property, 738.
 against estates of deceased, 1493.

Claim and delivery—generally, 509-520.
 application of Statute of Limitations, 338.
 delivery, when to be claimed, 509.
 affidavit and its requirements, 510.
 requisition to sheriff, 511.
 security on part of plaintiff, 512.
 service of process, 512.
 undertaking of plaintiff, 512.
 exceptions to sureties, proceedings on, 513.
 defendant, when entitled to redelivery, 514.
 justification of defendant's sureties, 515.
 qualifications of sureties, 516.
 concealed property, how taken, 517.
 property, how kept, 518.
 sheriff's return, 520.
 claim by third party, proceedings, 519.
 notice of claim and affidavit to be filed, 520.
 judgment on, to be an alternative, 667.
 limitation of action in, 338.
 in Justices' Courts, how enforced, 870.
 finding of jury in actions for, 627.
 execution on, to whom issued, 687.
 execution, what to recite, 682.
 judgment in, how enforced, 684-687.
 costs allowed on actions for, 1022.

Claims against estates—when must be presented, 1500.
 See **ESTATES OF DECEASED PERSONS**.

Clergyman or priest—communications, privileged, 1881.

Clerk—to make up calendar, 593.
 to keep judgment docket, 671-673.
 to enter judgment, 664.
 to keep judgment book, 668.
 to make up judgment roll, 670.
 can take affidavits, 2012.
 when to take down testimony, 1051.
 must indorse on complaint, what, 406.
 must keep register of actions, 1052.
 duty of, in contested elections, 1118.
 duty of, on confession of judgment, 1134.
 duty of, on submission to arbitration, 1283.
 what to transmit on verdict on mandate, 1093.
 of tribunal to return writ of review with transcript, 1070.
 to invest proceeds on partition sales, 789.
 duty of, on investment, 791.
 to attest decree in partition, 1684.

In probate matters.

to file and record certificate of proof, 1318.

Clerk—Continued.*In probate matters.*

- to file petition for letters, 1371.
- to post notices, 1373.
- to issue citation, 1384.
- to record letters, etc., 1387.
- to sign and seal letters, 1356.
- to issue letters, 1412.
- to give transcript and certificate, 1429.
- when to issue subpoenas and citations, 1707, 1708.
- to enter claims on register, 1497.
- to sign citation, 1707.

Code of Civil Procedure—existing actions, not affected by, 8.

- how divided, 1.
- limitation of actions not affected by, 9.
- not retroactive, 3.
- provisions of, applicable to enforcement of liens, 1198.
- provisions of, effect on existing statutes, 5.
- provisions applicable to Justices' Courts, 869.
- provisions of, applicable to proceedings for condemnation of land, 1256.
- rule of construction of, 4.
- interpretation clause, 17.
- repealing clause, 18.
- terms, how employed, 16.
- words defined, 17.
- when to take effect, 2.

Codes—construction of, generally, 4.**Codicil—will includes, 17.****Commencement of action—actions, how commenced, 405.**

- summons, issuance of, 407.
- alias summons, when to issue, 408.
- notice to be filed in real actions, 409.
- in Police Courts, 929.

**Commission to take testimony—within State, 2021, 2031-2036.
without State, 2024-2028.****Committee—see GUARDIAN.****Common law—Code not construed as in derogation of, 4.****Compensation—to tenants in partition, sales to be made, 778.**

- to be fixed by courts in such cases, 779.
- to owner, on condemnation of land, 1249.
- on unequal partition of land, 792.
- of appraisers in probate, 1444.
- of attorneys, regulated by agreement, 1021.
- of referee in probate, 1508, 1636.
- of executor by will, 1616.
- renunciation of same, 1616.
- further allowance, 1618.
- of agent of absentee on partition, 1692.
- of guardians, 1776.

Complaint—as a pleading, 422.

- first pleading in action, 425.
- allegations, admitted if not denied, 462.
- allegations, material, what are, 463.
- answer to, 437.
- answer to, failure to verify, 446.
- assignment of chose in action, etc., 368.
- commencement of action by filing, 350, 405.
- contents of, 426.

Complaint—Continued.

- defective heading, 1046.
- denials, general or specific, 437.
- fictitious name, suing by, 474.
- husband and wife, 370, 371.
- parent for injury or death of child, 376, 377.
- gold coin, etc., 667.
- guardian, as party, 876, 377.
- intervention, on, 387.
- irrelevant matter may be stricken out, 453.
- judgment, how pleaded, 456.
- in Justices' Courts, 853.
- limitations, 312-363.
- lis pendens*, 409.
- lost, how supplied, 1045.
- objections to, how waived, 434.
- objections to, when made by answer, 433.
- particulars of claim, 454.
- description of real estate, 455.
- redundant and sham matter, 453.
- statutes, how pleaded, 459.
- stock sold for delinquent assessment, 341.
- against surety, 1050.
- amendments to be filed and served, 432, 472, **473**.
- amendments, of course, 472.
- causes of action which may be joined, 427.
- causes of action must be separately stated, **427**.
- conditions precedent, how pleaded in, 457.
- demand for relief, 426.
- demurrer to, 430-434.
- for injunction, must be verified, 527.
- in Justices' Courts, what to contain, 853.
- indorsement of clerk to be made on, 406.
- in actions for seduction, 374, 375.
- in action for a nuisance, 731.
- in forcible entry and detainer, 1159-1173.
- in actions against steamers or boats, 813-815.
- in actions for usurpation of office, 804.
- in actions for partition, 753, 755, 761, 763.
- in actions for causing death or injury, 377.
- in actions to remove cloud on title, 738, 1050.
- in foreclosure suits, 726.
- in actions for slander, 463.
- in proceedings for condemnation of land, 1242.
- on application for voluntary dissolution of **corporation, 1228**.
- on usurpation of office or franchise, 803, 804.
- pleading performance of condition precedent, **457**.
- part of judgment roll, 670.
- signature to, 446.
- clerk to indorse, 406.
- service to be made of copy of, 410.
- statement of cause of action, how made, 426.
- statement in proceedings to contest elections, **1115**.
- suggestion of death, 385.
- supplemental, when may be made, 464.
- to be amended in certain cases, 1173.
- what to contain, 426.

Compromise—offer of defendant to, 997.

- proceedings on offer to, 997.
- of debt due estate of decedent, 1588.
- of debt due estate of ward, 1769.
- offer admits nothing, 2078.

- Compromise—Continued.**
 objections to tender must be specified, 2076.
 receipt may be demanded, 2075.
 in Justice's Court, 895.
 generally, 2074-2076, 2078.
- Computation of time—how made, 12.**
 time of performance of act may be extended, 1054.
- Concealed—property, possession of, how demanded, 517.**
 defendant, service how made on, 412.
 witness, subpoena, how served on, 1988.
- Conclusive evidence—defined, 1837.**
 how restricted, 1978.
- Condemnation of land—see EMINENT DOMAIN.**
- Condition precedent—performance of, how pleaded, 457.**
- Confession of judgment—may be made for debt due or for contin-
 gent liability, 1132.**
 statement on, 1133.
 filing statement and entering judgment, 1134.
 in Justices' Court, how made, 1135.
 jurisdiction governed by amount due, 1132.
- Consanguinity—as a disqualification in a judge, 170.**
 ground of challenge to juror, 602.
 ground of objection to referee, 641.
- Consolidation—of actions for liens, 1196.**
 of causes, in condemnation of lands, 1243.
 of actions, when may be ordered, 1048.
- Construction—of words and phrases in Code, 2-18.**
- Contempt—judicial officers may punish for, 178.**
 second application for order deemed a, 183.
 generally, 1209-1222.
 of juror for failure to attend, 238.
 compelling obedience generally, and preserving order, 128, 177.
 disobedience of witness, 128, 177, 1991-1994.
 what acts or omissions are, 1209.
 re-entry on property after eviction, 1210.
 in presence of court, how punished, 1211.
 in absence of court, what necessary to show, 1211.
 warrant may issue on notice to show cause, 1212.
- Contempt—what acts or omissions are, 1209.**
 re-entry on property after eviction, 1210.
 in and out of presence of court, proceedings on, 1211.
 warrant of attachment may issue, 1212.
 bail may be given by party arrested for, 1213.
 duty of sheriff on arrest, 1214.
 bail bond, form and conditions of, 1215.
 officer to return warrant and undertaking, 1216.
 hearing on charge preferred, 1217.
 judgment and penalty for, 1218.
 omissions, how punished, 1219.
 failure to appear at hearing, proceedings thereon, 1220.
 illness sufficient excuse for non-appearance, 1221.
 judgments and orders in cases of, are final, 1222.
 failure to attend as juror, 238.
 disobedience to mandate, 1097.
 disobedience by witness, 1991-1994.
 refusal to obey citation in Probate Court is a, 1460, 1461.
 in Justices' Courts, acts and omissions constituting, 906.
 in presence of justice, how punished, 107.

Contempt—Continued.

not in presence of justice, proceedings on, 908.
 punishment, measure of, in Justices' Court, 909.
 conviction for, to be entered in justices' docket, 910.
 provisions of Code as to service of process not to apply, 1016.
 disobedience to mandamus, 1097.

Contesting elections—who may contest, grounds of, 1111.

elections, when annulled for irregularity, 1112.
 when not annulled for malconduct, 1113.
 illegal votes, when not to vitiate elections, 1114.
 proceedings on contest, 1115.
 statement of cause of contest, 1116.
 list of illegal votes, when to be furnished, 1116.
 want of form of statement, not to vitiate, 1117.
 special term of court for trial of, 1118.
 citation to issue to respondent, 1119.
 witnesses, attendance, how enforced, 1120.
 powers of court in proceedings on, 1121.
 adjournment may be ordered, 1121.
 rules to govern, on trial, 1122.
 decision on trial, what court may declare, 1123.
 costs in proceedings, who liable for, 1125.
 appeal lies from decision on, 1126.
 appeal, when to be taken within ten days, 1127.

Contesting probate—See PROBATE OF WILL.**Continuance—**for absence of testimony, what required, 595.

in proceedings for mandate, when may be ordered, 1090.
 not allowed on amended complaint in forcible entry, 1173.
 for non-return of commission to take testimony, 2027.
 costs as a condition for, in discretion of court, 1029.
 in forcible entry and detainer, 1173.
 in mandamus, 1090.
 in Justices' Court, when may be ordered, 874.
 on consent of parties, 875.
 on application of either party, what must be shown, 876.
 affidavit when required, 876.
 not for more than ten days' exception, undertaking, 877.

Contractors—liens which may be secured by, 1183-1199.

See LIEN, ENFORCEMENT OF.

Contracts—conditions precedent in, how pleaded, 457.

express or implied, may be united in complaint, 427.
 attachment, when may issue in actions on, 537.
 when defendant may be arrested in actions on, 479.
 trial by jury, how waived in actions on, 631.
 judgment by default may be taken in action on, 586.
 judgments in gold coin, when may be taken on, 667.
 of purchase, by decedent, 1565.
 enforcement of, 1597.

Contribution—enforced by one of several judgment debtors, 709.
 among legatees on distribution of estate, 1564.**Convenience—**of witnesses, ground for change of venue, 397.**Conveyance—**judicial officers may take acknowledgment of, 179.

mortgage not to be deemed a, 744.
 of land on execution sale, when to be made, 703.
 under administrator's sale, 1555.
 of land by executors and administrators, 1597-1607.
 and sale of lands to pay decedent's debts, 1536-1576.

Corporations—pleadings, how verified by, 446.

summons, how served on, 411.
 appointment of receiver in insolvency of, 564.

- Corporations, dissolution of**—may be voluntarily dissolved, 1227.
 application for, what to contain, 1228.
 application, how signed and verified, 1229.
 filing application and publishing notice, 1230.
 objections may be filed, 1231.
 hearing of application, 1232.
 judgment roll, what constitutes, 1233.
 appeal lies from judgment, 1233.
 appointment of receiver in proceedings upon, 565.
 service of summons on, 411.
- Corroborative evidence**—defined, 1839.
- Costs**—and interest must be included in judgment, 1035.
 attorney's fees left to agreement, 1021.
 deceased's estate, action by creditor, 1503.
 may be imposed as a condition for continuance, 1029.
 bill of, 1033.
 verified memorandum of, to be filed, 1033.
 filing after remittitur, 1034.
 fees of attorney left to agreement, 1021.
 fees of referees, rate allowed, 1028.
 of referees in probate cases, 1508.
 fees of short-hand reporter, 271.
 fees of referees may be apportioned in partition, 768.
 how awarded against counties, 1039.
 in actions for wages and salaries, a preferred claim, 1206.
 in proceedings for condemnation of land, 1251, 1255.
 in proceedings to contest elections, 1124-1125.
 in actions for usurpation of office, 809.
 in actions by or against administrator, 1031, 1503, 1508, 1510, 1616.
 of abstract of title in partition, 799.
 of referees, 1028.
 of referees in partition, 768.
 of short-hand reporter, 271.
 of prior action for partition, 798.
 of partition as a lien, 796.
 of appeal, when discretionary, 1027.
 on nonsuit, 581.
 on judgment by default, 585.
 on appeal, how claimed and recovered, 1034.
 on frivolous appeal, damages may be added, 257.
 on disclaimer in actions to quiet title, 739.
 on application for sale by guardian, 1786.
 on several actions brought on a single cause, 1023.
 on review other than by appeal, 1032.
 security for, when may be required, 1036.
 security, if not given, action will be dismissed, 1037.
 when allowed, of course, to plaintiff, 1022.
 when allowed, of course, to defendant, 1024.
 when apportioned, discretion of court, 1025.
 when to be severed, 1026.
 when allowed, discretion, 1027.
 when tender was made before suit, 1030.
 in probate proceedings, by whom paid, 1720.
 on mandate, 1095.
 on suit for claim against estate, 1503.
 on application for share of estate, 1661.
 on action against executor, 1509.
 claimant failing to recover, must pay costs, 1510.
 allowance to executors, etc., 1616.
 on trial by referees in probate proceedings, 1508.
 on application for sale of ward's estate, 1786.
 on contesting validity or probate of will, 1332.

Costs—Continued.

on revocation of probate of will, 1332.
 in Justices' Courts, when allowed, 896, 924.
 against county, how paid, 1039.
 against State, how paid, 1038.
 after tender, 1030.

Counsellors-at-law—see ATTORNEYS.

Counter-claim—may be demurred to, 443.
 not barred by death or assignment, 439.
 may be set up by defendant on answer, 437.
 allegations in, deemed denied, 462.
 effect of filing on motion to dismiss action, 581.
 omission to set up, effect of, in Justices' Courts, 856.
 what constitutes, 438.
 demurrer to, 443, 444.
 dismissal on, 581.
 must be specially pleaded, 438.
 omission to set up, fatal, 439.
 each must be separately stated, 441.
 allegations in, deemed denied, 462.
 judgment for excess, 666.
 findings of jury on, 626.

County—summons, how served on, 411.
 place of trial of action against, 394.
 verification by, 446.
 costs in actions against, how paid, 1039.
 need not give security in actions, 1058.

County clerk—see CLERK.

County officers—exempt from jury duty, 201.

Court commissioner—how appointed, 258.
 powers of, 259.
 to have seal, 259.
 fees of, 259.
 not to have partner, 172.
 reference may be made to, 640.
 to report within twenty days, 259, 643.
 effect of findings of, 644.
 exceptions to findings, review of, 259, 645.

Courts of justice—enumerated, 33.
 which are courts of record, 34.
 for trial of impeachments, 36-39.
 Supreme Court, 40-56.
 Superior Courts, 65-79.
 Justices' Courts, 85-98.
 Justices' Courts in townships, 103-107.
 Police Courts, 121.
 sittings to be public, 124.
 exception in certain cases, 125.
 powers of, 128-130.
 place of holding to be provided, 144.
 place of holding, when may be changed, 142.
 judicial days, 133.
 non-judicial days, 134.
 appointments on non-judicial days, 135.
 powers respecting conduct of proceedings, 128, 177.
 courts of record may make rules, 129.
 when rules take effect, 130.
 proceedings in case of absence of judge, 139.
 adjournment till next regular session, 140.
 provisions as to places of holding courts, 142.

Courts of justice—Continued.

- parties to appear at place appointed, 143.
- when sheriff to provide court rooms, 144.
- seals of courts, what courts to have, 147.
- seal of Supreme Court, 148.
- seals of Superior Courts, 149.
- seals of Police Courts of cities and counties, 150.
- seals, how provided—private seals, when used, 151.
- clerk of court to keep seal, 152.
- seals of courts, to what documents affixed, 153.
- validity of certain writs, process, etc., without seals, 153.

Courts of record—what courts are, 34.**Credibility of witness—collateral facts may be inquired into, 1868.**

See WITNESS.

Creditors—when entitled to administer, 1365.

- cannot sue special administrator, 1415.
- to present claims against estate, time when, 1493.
- proceedings of, on presentation of claim, 1494–1504.
- may apply for order of sale of estate, 1545.
- may require suits brought to recover property of estate, 1590.
- may except to administrator's account, 1645.
- may assent to deduction on contingent claim, 1648.
- may have execution issued upon judgment, 1649.
- claim not included in order, how disposed of, 1650.

Criminal actions—provisions for, in Criminal Code, 31.**Cross-complaint—generally, 442.****Cross demands—not barred by death or transfer, 439.**

- compensate each other, 440.
- failure to set up, fatal, 434, 439.

Cumulative evidence—defined, 1838.**Currency—specific may be recovered, 667.****Custody—of abstract of title; in partition, 799.**

- of will, duty of custodian, 1296.
- custodian of will, when subject to arrest, 1302.
- custodian of public writings, bound to give copies, 1893.

See SHERIFF.

Customs—mining, effect of, 748.

- usage of trade, etc., 1870.

Damages—must be claimed in complaint, 426.

- when to be assessed by jury, 585.
- excessive, ground for new trial, 657.
- allowed for waste, 732.
- double, in proceedings to recover embezzled estate, 1460.
- treble, in actions for waste, 732.
- trebled, in actions for unlawful entry, 735, 1174.
- treble, in trespass, 733.
- improvements, when set off, to claim for, 741.
- purchaser under execution may sue for, 746.
- or for injury to property after sale, 746.
- joinder of claims for, 427.
- in proceedings for mandate, 1095.
- in proceedings for usurpation of office, 807.
- in nuisance, 731.
- for neglect to return inventory in probate, 1450.
- double, in case of fraud, 1572.
- in case of misconduct, 1571.
- for misconduct in probate sale, 1571, 1572.

Damages—Continued.

- on appeal taken for delay, 957.
- on judgment by default, 585.
- on disobedience to subpoena, 1992.

Days—judicial and non-judicial, 133-135.

- Death**—of party not to abate action, 385.
 - not to bar counter-claim, 440.
 - of attorney, reappointment to be made, 286.
 - effect on limitation, 327, 353.
 - effect of, on right to possession of land, 328.
 - after judgment, not to stay execution, 686.
 - set-off not affected by, 440.
 - not to invalidate judgment in partition, 766.
 - after verdict, judgment may be rendered, 669.
 - who may sue for injury causing, 376, 377.
 - wages in case of, a preferred claim, 1205.
 - when presumed, 1963.
 - to be reported to public administrator, 1728.

- Debtor**—required to answer as to his property, 714.
 - proceedings to compel appearance, 715.
 - when may be arrested, 715.
 - what bail may be given, 715.

- Debtor of debtor**—may pay claim of creditor, 716.
 - examination of, how conducted, 717.
 - trial, how conducted, 718.
 - property, how applied, 719.
 - proceedings on denial of indebtedness, 720.
 - attachment of, 542, 547, 688.
 - payment of, from estates, 1643-1653.
 - levy on execution under, 548, 688.
 - payment to sheriff, 547, 716.
 - disobedience of order, how punished, 721.

- Debts**—of decedents, estate to be listed, 1445, 1447, 1448.
 - to be collected by executor, 1581.
 - when may be compounded and compromised, 1588.
 - when executor not accountable for, 1615.
 - statement of, when to be filed, 1512.
 - payment of debts of decedent, 1643-1653.

- Debts and credits**—how attached, 542.
 - how seized on execution, 688.
 - may be collected by sheriff on attachment, 547.

- Decision**—of court, must be in writing, 632.
 - must be filed within twenty days, 632.
 - demurrer on, notice of, 476.
 - of motion for a new trial, 660.
 - facts and conclusions must be separately stated, 633.
 - exceptions to, when may be taken, 646.
 - when deemed excepted to, 647.
 - when subject to review on appeal, 956.
 - on motion to modify award is final, 1289.

- Declaration**—of parties, how far binding, 1848-1854.
 - of parties, when may be proved, 1870.
 - of deceased as to pedigree, effect of, 1852.
 - "oath" includes, 2097.
 - See EVIDENCE.

- Default**—on failure to answer amended complaint, 432.
 - when judgment to be rendered on, 535.
 - relief from judgment on, 473.
 - mandate, not granted by, 1088.

- Default**—*Continued.*
 relief to be awarded to plaintiff on, 690.
 in Justices' Courts, 871.
- Defect**—of parties, ground for demurrer, 430.
 of account, further account may be ordered, 454.
 in pleadings, when disregarded, 475.
- Defendant**—definition of, 308.
 summons must be directed to, 407.
 absent, appointment of attorney for, 412.
 publication of summons against, 412.
 time for appearance, 845.
 judgment by default in Justices' Court, 871.
 joinder of several, 380.
 landlord, when made, 397.
 parties who to be, 370, 384.
- Defenses**—several may be set forth in answer, 441.
 must be separately stated in answer, 441.
 when plaintiff may demur to, 443.
 when founded on written instrument, 448.
 in actions for libel and slander, 461.
 assignment not to prejudice, 368.
 generally, 437-442.
 order of, on trial, 607.
- Definitions**—of terms and phrases, 16.
 courts take judicial notice of, 1875.
 See EVIDENCE.
- Degrees of evidence**—enumerated, 1828.
- Delivery**—of property, at execution sale, how made, 696, 699.
- Demand**—of bill of items, how and when made, 454.
 in unlawful detainer, 1161.
- Demurrer**—must specify grounds, 431.
 may accompany answer, 431.
 to amended pleadings, 432.
 to amend pleadings in Justices' Court, 860.
 raises issues of law, 589.
 waives summons, 406.
 enlargement of time to amend, 473, 1054.
 not waived by simultaneous answer, 472.
 amendments of, course and effect of, 472.
 overruled, effect of, on answer, 472.
 time to amend, 476.
 grounds of, to petition for probate, 1312.
 grounds of, generally, 430.
 may be taken to part of pleading, 431.
 may be taken to answer in mandate, 1091.
 to answer, when to be taken, 443.
 to accusation against attorney, 295-296.
 objections, when deemed waived, 434.
 what issues are raised by, 589.
 exceptions, when deemed taken to decision on, 647.
 when defendant may demur, 430.
 in Justices' Courts, 854.
 proceedings on in Justices' Courts, 858.
 judgment on, 636.
- Denial**—effect of failure to deny, 462.
 must be specific, to verified complaint, 437.
- Depose**—includes every mode of written oath, 17.
- Deposit**—to secure discharge from arrest, 486.
 may be made instead of bail, 497.

Deposit—Continued.

- sheriff to pay into court, 498.
 - released, on giving bail, 499.
 - instead of undertaking in Justices' Courts, 926.
 - how applied, in satisfaction of judgment, 500, 550.
 - of fees, on trial of rights to property, 689.
 - of summons, in post-office, 415.
 - surplus on sale of ship, 825.
 - in post-office, on service by mail, 1013.
 - no limitation to action for money left on, 348.
- Deposit in court**—of money in hands of trustee, 572.
- to be placed by clerk with county treasurer, 513, 2104.
 - order for, how enforced, 574.
 - of surplus money, in foreclosure suits, 727.
 - of surplus, after sale of steamer or boat, 825.
 - on substitution of new defendant, 336.
 - on appeal, 941-949.
 - on appeal, may be waived, 948.
 - for costs, in Justices' Courts, 923.

Depositions—depose, term defined, 17.

- court commissioners may take, 259.
- definition of deposition, 2004.
- form of taking, 2006.
- when may be used, 2019.
- of witness out of State, when taken, 2020.
- of witness in the State, when taken, 2021.
- of witness out of State, how taken, 2024.
- commission, to whom to issue, 2024.
- interrogatories, when to be prepared, 2025.
- authority and duties of commissioners, 2026.
- non-return of commission, when trial continued, 595, 2027.
- postponement for taking, 595, 2027.
- by whom may be used, 2028.
- of witness in the State, before whom taken, 2031.
- how taken, and by whom may be used, 2032.
- when may be excluded, 2033.
- once taken may be read at any time, 2034.
- to be used in other States, 2035.
- of witness, how procured upon commission, 2036.
- how procured if no commission issue, 2037.
- when may be taken without commission, 2037.
- testimony of witness, how taken, 2038.
- of witness may be taken in case of, adjournment, 596.

See EVIDENCE.

Derogation of common law—Code not deemed in, 4.

Descent—right of possessors not affected by, 329.

Description—of real property in pleadings, 455.
order of survey, 743.

Devisee—See PROBATE OF WILL, ESTATES OF DECEASED PERSONS.

Direct evidence—defined, 1831.
what sufficient to prove facts, 1844.

Disability—not to abate action, 385.
of justice, proceedings thereon, 922.
when to be availed of, 357.
when two or more exist, 358.
limitation, how affected by, 352.
limitations must exist, when right accrues, to avoid, 347.
See ABATEMENT, LIMITATION OF ACTIONS.

- Disbursements**—when allowed in actions, 1021.
bill of, by whom verified, 1033.
- Discharge**—from arrest, exonerates bail, 491.
from arrest, effect of, 486.
of sick juror, 615.
of prisoners, 1143-1154.
- Discharge from imprisonment**—of persons in civil actions, 1143.
for failure of plaintiff to furnish weekly support, 1154.
notice of application for, 1144.
service of notice, 1145.
examination of prisoner before judge, 1146.
interrogatories may be in writing, 1147.
oath to be administered, 1148.
order of discharge, 1149.
successive applications for, 1150.
when final, 1151.
judgment may be enforced against estate, 1152.
prisoner not subject to rearrest after, 1153.
See **ARREST AND BAIL**.
- Discharge of executors**—from debt due decedent, 1447, 1448.
from debt by will, 1448.
order for, 1647.
by judgment or decree, 1697.
See **EXECUTORS AND ADMINISTRATORS**.
- Disclaimer**—generally, 739.
- Discontinuance**—entering, 581.
- Discretion of court**—on allowance of costs, 1025.
costs of appeal, when in, 1027.
costs on postponement of trial, are in, 1029.
costs on proceedings for condemnation of land in, 1255.
granting stay, under writ of review in, 1072.
ordering issues in mandate to be tried by jury in, 1090.
evidence on collateral questions, admitted in, 1868.
view by jury of premises, allowed in, 1854.
order of trial, 607.
order of proof in, 2042.
form of administering oath, in, 2095.
expenses of referees in partition, 768, 796.
to order reference in accusation against attorney, 298.
- Dismissal**—of action, for failure to furnish security for costs, 1037.
when either party may take a, 594.
when action may be dismissed, 581.
of appeal, for failure to furnish papers, 964.
of appeal, effect of, 955.
- Disobedience**—see **CONTEMPTS**.
- Disqualifications**—of judge, 170.
of judge, ground for removal of cause, 397.
executor may qualify on removal of, 1354.
of judge in probate, proceedings, 1430.
of jurors, enumerated, 602.
of referee, enumerated, 641.
- Distribution**—see **ESTATES OF DECEASED PERSONS**.
- Divorce**—sittings of court may be private in, 125.
- Docket**—of judgment, to be kept by clerk, 671.
what constitutes, 672.
entries in, how made, 672.
to be open for public inspection, 673.

Docket—Continued.

- transcript of, may be filed in other counties, 674.
- satisfaction of judgment, to be entered in, 675.
- in Justices' Courts in cities and counties, 93.
- of justice of peace, pleadings to be entered in, 851.
- of justice, what to contain, 911.
- of justice, as primary evidence, 912.
- index to be kept by justice, 913.
- of justice, to be delivered to successor, 914.
- proceedings, on office becoming vacant, 915.
- execution may issue on, 916.
- transcript of docket of foreign justice, as evidence, 1921.
- transcript, how authenticated, 1922.
- copy of, to be produced by redemptioner, 705.

Ejectment—action of, not prejudiced by alienation, 740.

- costs allowed in actions of, 1022.
- set-off for improvements, 741.
- survey of property, 742, 743.
- title terminating during suit, 740.
- claims may be united in actions of, 427.
- findings of jury in actions of, 625.

Election—of supreme justices, 40.

- of superior judges, 65.
- eligibility to judicial office, 156, 157.
- contesting, proceedings thereon, 1111-1127.
- See **CONTESTING ELECTIONS.**

Elisor—compensation for summoning jurors, 228.

- Embezzlement—of money, a ground for arrest, 479.**
- of estate of decedents, 1458-1461.
- letters of administration may be revoked for, 1626.
- of property of ward, 1800.

Eminent domain—all former laws abolished, 1259.

- Code, when to take effect, 1258.
- definition of, 1237.
- purposes of its exercise, 1238.
- estates which may be acquired under, 1239.
- private property defined, classes enumerated, 1240.
- facts to be found before condemnation, 1241.
- parties may locate, may enter thereon, 1242.
- jurisdiction in Superior Court, 1243.
- complaint, contents of, 1244.
- summons, what to contain—issuance and service, 1245.
- answer, what to show, and how verified, 1246.
- counter-claim, 438, 442.
- jurisdiction to regulate crossings and common use, 1247.
- hearing, 1248.
- court or jury to assess damages, 1248.
- compensation and measure thereof, 1249.
- new proceedings to cure defective title, 1250.
- payment of damages, 1251.
- payment, to whom made, 1252.
- final order of condemnation, what to contain, 1253.
- order when filed, title vests, 1253.
- putting plaintiff in possession, 1254.
- costs apportioned in discretion of court, 1255.
- rules of practice in proceeding under, 1256.
- new trials and appeals, 1257.
- construction of Code as to, 1258.

English language—court proceedings to be in, 185.

- Entry**—on real estate, when valid, 322.
- Entry of judgment**—at any time, 89.
in vacation, 48, 78.
- Errors**—immaterial, to be disregarded, 475.
of law, ground for new trial, 657.
- Escheated estates**—proceedings relative to, how commenced, 1263.
receiver of rents and profits may be appointed, 1270.
appearance, pleadings, and trial, 1271.
proceedings by claimant of, 1272.
generally, 1267-1272.
- Estate for life or years**—how set off in partition, 770.
- Estate of deceased persons**—
Inventory, appraisal and possession of.
inventory to be returned, including homestead, 1443.
appraisal and pay of appraisers, 1444.
appraisers, by whom appointed, 1444.
oath of appraisers, 1445.
inventory, how made, 1445.
inventory to account for money, 1446.
if all money, no appraisal necessary, 1446.
claim against executor to be included in inventory, 1447.
discharge of debt or bequest in will to be included, 1448.
appraisers to make oath to inventory, 1449.
revocation of letters for neglect to return inventory, 1450.
inventory of after-discovered property, 1451.
administrator and executor to possess estate, 1452.
to deliver estate to heirs and devisees, when, 1453.
- Embezzlement and surrender of property of.*
embezzlement before grant of letters testamentary, 1453.
citation to issue to person suspected, 1459.
penalty for refusal to obey citation, 1460.
disclosures may be compelled by imprisonment, 1460.
liability for double damages, 1460.
persons intrusted with estate may be cited to account, 1461.
- Of provision for support of family.*
widow and minor children may remain in decedent's house, 1464.
property exempt from execution set apart for family use, 1465.
court or judge may make extra allowance, 1466.
payment of allowance preferred to other charges, 1467.
property set apart, how apportioned, 1468.
estates, when to go to wife and child, 1469.
estates, when to be summarily administered, 1469.
when all property to go to children, 1470.
- Of the homestead.*
rights of survivor to homestead, 1474.
selected and recorded homestead to be set off, 1475.
subsisting liens to be paid by solvent estate, 1475.
appraisers, when to carve out of original, 1476.
report of appraisers thereon, 1477.
majority and minority reports, which confirmed, 1477.
day to be set for confirmation or rejection, 1478.
if report rejected, other appraisers to be appointed, 1479.
if again rejected, partition suit to be brought, 1479.
instead of dividing homestead, what steps may be taken, 1480.
homestead, when may be petitioned for, 1481.
court to direct partition suit, when, 1482.
court may cause appraisal of common or separate property,
1483.
new appraisal, when ordered, 1484.
public sale of property, when may be ordered, 1484.
costs of proceedings, to whom chargeable, 1485.

Estates of deceased persons—Continued.*Of the homestead.*

successors to rights of homestead owners, powers and rights of, 1485.

certified copies of final order to be recorded, 1486.

Of claims against the estate.

notice to be given to creditors, 1490.

notice, how given, 1490.

removal of executor for neglect to give notice, 1491.

time expressed in notice, 1491.

copy of notice and affidavit to be filed, 1492.

time within which to present claims, 1493.

claims to be sworn to, interest, 1494.

claim may be presented by superior judge, 1495.

allowance to be indorsed on claim, 1496.

rejection, what deemed, 1496.

approved claims or copies to be filed, 1497.

duty of clerk, 1497.

claims secured by liens, how described, 1497.

rejected claims, when to be sued for, 1498.

claims barred by statute not to be allowed, 1499.

examination of claimant on oath, 1499.

claims must be presented before suit, 1500.

exceptions as to liens, 1500.

limitation of time, how affected by vacancy of administration, 1501.

claims in actions pending before decease, 1502.

allowance of claim in part, 1503.

judgment against executor, effect of, 1504.

execution not to issue after death, when, 1505.

property levied on may be sold, proceeds, how applied, 1505.

judgment, when not a lien, 1506.

doubtful claims may be referred, 1507.

allowance or rejection by referee, effect of, 1507.

trial by referee, how confirmed, effect of, 1508.

costs on contest of, liability for, 1509.

claim of executor, to whom presented, 1510.

suit by executor for claim rejected, how commenced, 1510.

executor to return statement of, 1512.

statement, what to contain, 1512.

Sales and conveyance of property of decedents.

personal estate first chargeable for debts, 1516.

real estate, when to be sold, 1516.

no sales valid, except by order of court, 1517.

petitions for orders of sale, showing required, 1518.

but one petition, order and sale to be had, 1519.

perishable and depreciating property to be sold, 1522.

order to sell personal property, 1523.

partnership interests and choses in action, how sold, 1524.

order of sale, what to direct, 1525.

what to be first sold, 1525.

sale of personal property to be made at auction, 1526.

mines may be sold, how, 1529.

petition for, who may file and what to contain, 1530.

order to show cause, how made, notice, 1531.

order of sale of mines, how and when made, 1532.

provisions of Code applicable to sale of mines, 1533.

real estate may be sold, when, 1536.

verified petition for sale, what to contain, 1537.

to what petition may refer, 1537.

order to interested persons to appear, 1538.

order to show cause, must be previously served, 1539.

notice, when to be served, 1539.

Estates of deceased persons—Continued.

- Sales and conveyance of property of decedents.*
 notice to be dispensed with, when, 1533.
 hearing of petition after proof of service, 1540.
 presentation of claims at hearing, 1540.
 who may be examined at hearing, 1541.
 court may authorize sale of all or part of, 1542.
 order of sale, when to be made, 1543.
 order, what to contain, 1544.
 sale may be public or private, 1544.
 any person interested may apply for order, 1545.
 form of petition by party interested, 1545.
 executor to be served with copy of order, 1546.
 notice of sale to be posted and published, 1547.
 time and place of sale, 1548.
 private sale, how made; notice, how given, 1549.
 bids, where and how recorded, 1549.
 ninety per cent. of appraised value must be offered, 1550.
 purchase-money on credit sale, how secured, 1551.
 return of proceedings on sale to be made, 1552.
 hearing upon return, proceedings thereon, 1552.
 when a resale may be ordered, 1552.
 objections to confirmation, who may file, 1553.
 order of confirmation, when and when not to be made, 1554.
 conveyance, when to be executed, 1555.
 order of confirmation, what to state, 1556.
 sale, where may be postponed, 1557.
 notice of postponement to be given, 1558.
 sale of real estate to pay legacy, 1559.
 where payment of debts is provided for by will, 1560.
 sale without order, when may be made, 1561.
 where provision by will is insufficient, 1562.
 estate subject to debts, proportionate liability, 1563.
 contribution among legatees, when to be had, 1564.
 interest in contract for purchase of lands may be sold, 1565.
 conditions of sale of interest in contract, 1566.
 purchaser to give bond, 1567.
 assignment of contract on confirmation of sale, 1568.
 sales of lands under mortgage liens, 1569.
 holder of mortgage or lien may purchase, 1570.
 his receipt for claim a valid payment, 1570.
 administrator or executor liable for misconduct in sale, 1571.
 liability in double the value for fraudulent sale, 1572.
 limitation of actions for vacating sale, 1573.
 minority and other disability to avoid limitation, 1574.
 account of sale to be returned, 1575.
 executor, etc., not to be purchaser, 1576.
 surviving partner to settle up business, 1585.
 executor may compound, 1588.
 when executor to sue, 1590.
 disposition of estate recovered, 1591.
- Of conveyance of real estate in certain cases.*
 executors to complete contracts for sale of real estate, 1597.
 petition for conveyance and notice of hearing, 1598.
 interested parties may contest, 1599.
 conveyances, when ordered to be made, 1600.
 execution of conveyance and record, how enforced, 1601.
 rights of petitioner to enforce contract, 1602.
 effect of conveyance, 1603.
 effect of recording copy of decree, 1604.
 recording decree not to supersede power of court, 1605.
 successors to party having right to conveyance, 1606.
 when decree to direct possession given, 1607.

Estates of deceased persons—Continued.*Payment of debts of.*

- order in which to be paid, 1643.
- where property insufficient to pay mortgage, 1644.
- dividend, when to be paid, 1645.
- expenses of funeral, and of last sickness, and family allowance, 1646.
- order for payment of debts and discharge of executor, 1647.
- provision for disputed and contingent claims, 1648.
- after decree, executor personally liable, 1649.
- claims not included in order, how disposed of, 1650.
- order for payment of legacies and extension of time, 1651.
- final account, when to be made, 1652.
- neglect to render final account, how treated, 1653.

Partial distribution prior to final settlement of.

- payment of legacies upon giving bonds, 1658.
- notice of application for legacies, 1659.
- who may resist application, 1660.
- decree to require bond, which must be given, 1661.
- decree may order whole or part of share delivered, 1661.
- partition, where necessary, how made, 1661.
- costs to be paid by applicant, 1661.
- order of payment of bond, and suit thereon, 1662.

Distribution on final settlement.

- distribution, how made and to whom, 1665.
- what the decree must contain, 1666.
- decree of distribution final, 1666.
- distribution when decedent was foreign resident, 1667.
- decree to be paid only after notice, 1668.
- taxes to be paid before distribution, 1669.

Distribution and partition.

- partition to be made of estate in common, 1675.
- commissioners for partition, 1675.
- petition for partition, notice thereof to be given, 1676.
- estate in different counties, how divided, 1677.
- partition after some heirs have parted with their interest, 1678.
- shares to be set out by metes and bounds, 1679.
- whole estate may be assigned to one, when, 1680.
- equality of partition; payment for, by whom made, 1681.
- estate may be sold and proceeds distributed, 1682.
- notice before partition, to whom given, 1683.
- commissioners, duties of, 1683.
- commissioners, to report and partition to be recorded, 1684.
- commissioners, when not necessary to appoint, 1685.
- advancements made to heirs, how heard and determined, 1686.

Agents for absent interested parties.

- court may appoint agent for absentee, 1691.
- agent to give bond, compensation of, 1692.
- unclaimed estate, how disposed of, 1693.
- real and personal property of absentee, when to be sold, 1694.
- liability of agent on his bond, 1695.
- certificate to claimant of money in treasury, 1696.
- final settlement, decree, and discharge, 1697.
- discovery of property after final settlement, 1698.
- proceedings to apply to proceedings as to guardian and ward, 1808.

See EXECUTORS AND ADMINISTRATORS, PUBLIC ADMINISTRATOR.

Estoppel—generally, 1906.

- when presumptions conclusive, 1962.
- sureties bound by, 1912.

Evidence—*Definitions of.*

judicial evidence, 1823.
 proof, 1824.
 law of evidence, 1825.
 degree of certainty required, 1826.
 original evidence, 1829.
 secondary evidence, 1830.
 direct evidence, 1831.
 indirect evidence, 1832.
 indirect evidence classified, 1957.
 primary evidence, 1833.
 partial evidence, 1834.
 satisfactory evidence, 1835.
 indispensable evidence, 1836.
 conclusive evidence, 1837.
 conclusive evidence, how restricted, 1978.
 cumulative evidence, 1838.
 corroborative evidence, 1839.
 inference defined, 1958.
 presumption defined, 1959.

Degree of proof.

what required to establish fact, 1826.
 kinds of evidence, 1827.
 degrees of evidence, 1828.
 one witness, when sufficient to prove a fact, 1844.

General principles.

direct evidence, what sufficient to prove a fact, 1844.
 testimony confined to personal knowledge, 1845.
 testimony to be in presence of persons affected, 1846.
 witness presumed to speak the truth, 1847.
 presumption, how repelled, 1847, 2051, 2052.
 one person not affected by acts of another, 1848.
 declarations of predecessors in title, as, 1849.
 declarations which are part of transaction, 1850.
 evidence relating to third person—primary when, 1851.
 declaration of decedent, evidence of pedigree, 1852.
 declarations of decedent, evidence against successor, 1853.
 part of transaction proved, the whole admissible, 1854.
 contents of writing, how proved, 1855.
 agreement in writing, deemed the whole, 1856.
 construction of writing, relates to place, 1857.
 construction of statutes and instruments, rule of, 1858.
 intention of Legislature or parties to be pursued, 1859.
 circumstances to be considered, 1860.
 terms to be construed by general acceptance, 1861.
 written, to control printed words, in blank form, 1862.
 persons skilled to decipher characters, 1863.
 of two constructions, which to be preferred, 1864.
 written instrument construed as understood by parties, 1865.
 construction to be in favor of natural right, 1866.
 material allegations only, need be proved, 1867.
 evidence to be relevant to questions in dispute, 1868.
 evidence on collateral questions in discretion of court, 1868.
 affirmative allegations only to be proved, 1869.
 facts which may be proved on trial, 1870.
 judicial notice, of what facts court will take, 1875.
 persons who cannot testify, 1880.

Kinds and degrees of evidence.

knowledge of court, facts within, 1875.
 of witnesses—see WITNESSES.
 of writings—see WRITINGS, PUBLIC WRITINGS, PRIVATE WRITINGS.

Evidence—Continued.*Kinds and degree of evidence.*

- acknowledged writings as evidence, 1951.
- entry in court minutes, 1376, 1429.
- of material objects presented to the senses, 1954.
- when an inference arises, 1960.
- presumption, when may be controverted, 1961.
- specification of conclusive presumptions, 1962.
- specification of controvertible presumptions, 1963.
- what evidence indispensable, 1967.
- perjury and treason, evidence required to prove, 1968.

Statute of Frauds.

- will, to be in writing, 1969.
- revocation of will, what required to prove, 1970.
- transfer of real property, evidence required, 1971, 1973.
- agreement not in writing, when invalid, 1973.
- representation as to credit of third party, 1974.

Production of evidence.

- by whom to be produced, 1981.
- writing altered, who to explain, 1982.
- warrants to commit witnesses, 1994.
- when witness prisoner, 1995.
- manner of production—testimony, how taken, 2002.
- testimony of witness in State, 2021.
- testimony of witness out of State, 2024.
- how to procure testimony on commission, 2036.
- discharge of witness, 2070.

See AFFIDAVIT, DEPOSITIONS, EXAMINATION OF WITNESSES.

means of production—see SUBPŒNA, WITNESSES.

Effect of evidence.

- jury to judge of, 2061.
- conclusive evidence, jury not to judge effect of, 2061.
- to be instructed by court as to, 2061.

Miscellaneous provisions as to evidence.

- accounts, when not admissible, 454.
- an offer equivalent to payment, 2074.
- whoever pays is entitled to a receipt, 2075.
- objections to tender, at what time to be taken, 2076.
- rules for construing description of land, 2077.
- offer of compromise not an admission of debt, 2078.
- confession of adultery, effect of in divorce, 2079.
- proceedings to perpetuate testimony. See TESTIMONY.
- administration of oaths and affirmations. See OATH.
- questions of fact to be decided by jury, 2101.
- what questions to be decided by court, 2102.
- questions of fact to be decided by court or referee, 2103.

**Examination—of debtor of judgment debtor; proceedings in, 717.
trial of, how conducted, 718.****Examination of witness—oral examination defined, 2005.**

- order of proof, how regulated, 2042.
- when witness may be excluded, 2043.
- court may control mode of interrogation, 2044.
- direct and cross-examination defined, 2445.
- leading question defined, 2046.
- witness may refresh memory by notes, when, 2047.
- cross-examination, as to what, 2048.
- party producing not allowed to lead witness, 2049.
- witnesses, when and how examined, 2050.
- how impeached, general reputation, 2051.
- impeachment of witness, inconsistent statements, 2052.
- evidence of good character, when allowed, 2053.

Examination of witness—Continued.

writing shown to witness subject to inspection, 2054.

See WITNESSES.

Exceptions—may be taken, time when, 646.

what deemed excepted to, 647.

form of, 648.

to be signed by judge and filed with clerk, 649.

how taken on notice to adverse party, 650.

after judgment, how taken, 651.

proceedings on refusal of court to allow, 652.

where judge ceases to hold office, file, how settled, 653.

may be taken to report of referee, 645.

bill of, necessary on motion for new trial, 658.

bill of, part of judgment roll, 670.

to sureties in libel and slander, 416.

to sureties on undertakings, how taken, 948.

to sureties in replevin, when to be taken, 513.

to referee's report, 645.

Excessive damages—as ground for new trial, 657.**Execution—within what time may issue, 681.**

who may issue, form of, what to require, 682.

when made returnable, 683.

money judgments and others, how enforced, 684.

execution after five years, when allowed, 685.

when may issue after death of party, 686.

how and to whom issued, 687.

debts and credits liable to seizure on, 688.

gold dust, 688.

property not affected till levy made, 688.

right of property claimed by third party, how tried, 689.

deposit of fees on trial of right, 689.

property exempt from, 690.

writ of, how executed, 691.

notice of sale under, how given, 692.

selling without notice, penalty attached, 693.

sales, how conducted, 694.

who may not be purchaser at sale, 694.

order of sale, who may direct, 694.

refusal of purchaser to pay bid, resale, 695.

summary proceedings against purchaser refusing to pay, 696.

liability of officer, limitation of, 697.

personal property capable of manual delivery, how delivered, 698.

personal property not capable, how delivered, 699.

real property, when absolute sale or not, 700.

when not, what certificate should contain, 700.

real property sold, by whom may be redeemed, 701.

when may be redeemed, and redemption money, 702.

successive redemptions, when may be made, 703.

notice of redemption to be given sheriff, 703.

effect of redemption, 703.

in default of redemption, conveyance to be made, 703.

on redemption, to whom payments to be made, 704.

redeemtioner, what must do to redeem, 705.

court may restrain waste, pending redemption, 706.

on good cause shown injunction may issue, 745.

rents and profits, who entitled to, 707.

eviction after purchase, what purchaser may recover, 708.

when judgment to be revived, 708.

petition for revival of judgment, how and by whom made, 708.

party who pays more than his share, may compel contribution,

709.

debtor of debtor may pay sheriff, 716.

Execution—Continued.

- for deficit on foreclosure, 726.
- proceedings supplementary to execution—see **SUPPLEMENTARY PROCEEDINGS.**
- against steamers and boats, proceeds of sale, how applied, 824.
- notice of sale of steamers to be given, 827.
- stay of, on appeal to County Court, 979.
- from Justices' Courts, within what time may issue, 901.
- contents of justices' execution, 902.
- may be renewed in Justices' Court, 903.
- duty of officer receiving execution, 904.
- proceedings supplementary, provisions of Code to apply, 905.
- may issue against married woman in forcible entry, 1164.
- what wages are preferred claims under, 1206.
- in contempts, 1209, 1210.

Executors—appointment, 304.

- appeals by, 965.
- acts of, where appointment vacated, 966.
- to whom letters on proved will, to issue, 1349.
- must appear and qualify, 1349.
- who incompetent to serve as, 1350.
- who may file objections to granting letters to, 1351.
- marriage, when it extinguishes right to administer, 1352.
- executor of an executor, disability of, 1353.
- absence or minority of coexecutor, effect of, 1354.
- acts of a portion of executors, valid, 1355.
- form of letters testamentary, 1360.
- to take oath, 1387.
- to file bonds, 1388.
- to record letters, etc., 1387.
- suspension of powers of executor, 1436, 1437.
- to be removed for contempt, 1721.
- may sue without joining party interested, 369.
- may sue for death of person, 377.
- renunciation of right to probate by, 1301.
- transcript of proceedings, evidence of executor's authority, 1429.
- to return inventory including homestead, 1443.
- to deliver estate to heirs, 1453.
- effect of judgment against, 1504.
- to return statement of claims, 1512.
- claim of, against estate, 1510.
- sales of lands under mortgage or liens, 1569.
- when may sue on partnership estate, 1590.
- petition to make conveyance, and notice, 1596.

See **EXECUTORS AND ADMINISTRATORS.**

Executors and administrators—to take oath and file bonds, 1387.

- bonds to be recorded, 1387.
- form and requirements of bond, 1388.
- additional bond, when required, 1389.
- conditions of, 1390.
- each to give separate bond, 1391.
- successive suits on bond may be maintained, 1392.
- sureties must justify and bonds be approved, 1393.
- requirement of judge on deficient bond, 1394.
- right ceases on insufficient security, 1395.
- bond, when may be dispensed with, 1396.
- further bond may be required, 1397.
- citation to executor to show cause, 1398.
- further security may be ordered, 1399.
- revocation of letters for neglect to obey order, 1400.
- suspension of powers of, 1401.
- further security ordered without application, 1402.

CODE CIV. PROC.—66.

Executors and administrators—Continued.

- release of sureties, 1403.
- new sureties, order of release, 1404.
- forfeiture of letters for neglect to give new sureties, 1405.
- application to be determined, when, 1406.
- liability on bond, 1407.
- letters revoked on will subsequently found, 1423.
- power of executor in such case, 1424.
- when colleagues are disqualified, remaining executor, etc., to act, 1425.
- who to act when all incompetent, 1426.
- resignation of, when, 1427.
- court to appoint successor, 1427.
- liability of outgoer, 1427.
- all acts of, valid till power is revoked, 1428.
- transcript from minutes of court as evidence of authority of, 1429.
- Removal and suspensions in certain cases.*
 - suspension of powers of, for embezzlement, 1436.
 - notice to be given and citation to appear, 1437.
 - who may appear on hearing, 1438.
 - notice to absconding executors, etc., 1439.
 - court may compel attendance, 1440.
 - letters revoked for failure to furnish inventory, 1450.
- Of the powers and duties of.*
 - entitled to possession of all decedent's property, 1452.
 - to take possession of entire estate, 1581.
 - may sue and be sued for recovery of property, 1582.
 - may sue for embezzlement prior to grant of letters, 1458.
 - may sue for possession of estate, 1452.
 - may maintain actions for waste, conversion, and trespass, 1583.
 - may be sued for waste or trespass of decedent, 1584.
 - actions on bond of executor may be brought by another, 1586.
 - what executors need not be parties, 1587.
 - may compound with debtor, 1588.
 - may recover property fraudulently disposed of by testator, 1589.
 - disposition of estate recovered, 1591.
 - may complete contracts of sale of real estate, 1597.
 - allowance and rejection of claims by.
 - See ESTATES OF DECEASED PERSONS/
- Liabilities and compensation of.*
 - when personally liable, 1612.
 - to be charged with all estate, 1613.
 - not to profit or lose by estate, 1614.
 - for uncollected debts without fault, 1615.
 - compensation of, 1616.
 - not to purchase claims against, 1617.
 - commissions allowed to, 1618.
- Accounting and settlements by.*
 - to render exhibit, when, 1622.
 - citation to account, 1623.
 - petition for citation to render account, 1624.
 - citation to account on application, 1625.
 - objections to account, who may file, 1626.
 - attachment for disobeying citation, 1627.
 - to render accounts at expiration of term, 1628.
 - to account after authority revoked, 1629.
 - revocation of letters for neglect to account, 1630.
 - to produce and file vouchers, 1631.
 - vouchers, when need not be produced, 1632.
 - appointment of day of settlement, notice thereof, 1633.
 - final settlement, partition and distribution may be simultaneous, 1634.

Executors and administrators—Continued.*Accounting and settlements by.*

- who may file exceptions to account, 1635.
- what matters may be contested by heirs, 1636.
- postponement of hearing in contest of account, 1637.
- settlement of accounts, when, and when not conclusive, 1637.
- proof of notice must be made before settlement, 1638.
- funds pending settlement, 1640.
- personal liability of, after decree for payment of debts, 1649.
- liability for failure to give notice for presentation of claim, 1650.
- final account, when to be made, 1652.
- neglect to render final account, how treated, 1653.
- final settlement, decree and discharge, 1697.
- costs allowed in actions by and against, 1931.
- on appeal, security may be limited or modified, 946.

Exemption—property exempt from execution, 690.
from jury duty, who are exempt, 200.

Exoneration—of bail. See ARREST AND BAIL.

Experts—skilled persons may decipher characters, 1863.
facts which may be proved on trial by, 1870.
may prove unwritten law of sister State, 1902.
See EVIDENCE.

Extension—of time, 1054.

Facts—to be stated in complaint, 426.
insufficiency of, ground for demurrer, 430.
special issues not made by pleadings, how tried, 309.
degree of certainty required to establish, 1826.
what facts may be proved on trial, 1870.
issue of, how it arises, 590.
how tried, 592.
findings of, 633, 634.
agreement on, on submission of controversy, 1138.
of which court will take judicial notice, 1875.
jury as judges of, 2101.

Farmer—property of, exempt from execution, 690.

Father—may sue for seduction of daughter, 375.
may sue for death or injury of child, 376.
rank, in order of persons entitled to administer, 1365.
entitled to guardianship of minor, 1751.

Fees—officers entitled to, 91.
of court commissioners, 259.
of official reporter, 274.
tender of, to be made to witness, 1987.
of attorney, how to be paid, 1021.
of referees, 1028.
on recording mechanics' lien, 1189.
of witnesses, 1987.
See COSTS.

Feminine—included in masculine, 17.

Fictitious name—party may be sued by, 474.
ignorance of real name to be stated in complaint, 474.

Findings—referees to report within twenty days, 643.
effect of findings of referees, 644.
of referee, may be excepted to, 645.
of fact, how waived, 634.
must be in writing and filed within twenty days, 633.
of fact and conclusions of law, must be separately stated, 633.

Findings—Continued.

- how prepared, 635.
- practice and proceedings on, 635.
- on counter-claim, 626.
- on claim and delivery, 627.
- general and special defined, 624.
- when general or special may be given, 625.

- Fines**—for neglect of juror to appear, 238.
- may be imposed on usurpation of office, 899.
- actions for, in Police Courts, 932.
- imposed for neglect to obey mandate, 1007.
- imposed for contempts, 1218.
- imposed on State officers, how enforced, 1007.
- See FORFEITURE.

- Fire engines**—exempt from execution, 690.

Forcible entry and detainer—jurisdiction in actions for, 76.

- Justices' Court jurisdiction, 112, 113.
- treble damages, when allowed, 735.
- forcible entry defined, 1159.
- forcible detainer defined, 1160.
- unlawful detainer defined, 1161.
- notice by landlord, 1161.
- notices, how served in, 1162.
- jurisdiction, 1163.
- parties defendant in actions for, 1164.
- parties generally, 1165.
- complaint in actions for, 1166.
- day for appearance to be fixed, 1166.
- service of summons and complaint, 1167.
- summons, form and service of, 1167.
- arrest, order for, when made, 1168.
- judgment by default may be entered, 1169.
- defendant may appear, answer, or demur, 1170.
- trial may be by jury, 1171.
- showing required of plaintiff, 1172.
- what defendant may show, 1172.
- complaint must be amended, when, 1173.
- verdict and judgment in, 1174.
- treble damages, 735, 1174.
- complaint and answer must be verified, 1175.
- appeal not to stay proceedings unless so directed, 1176.
- rules of practice and proceedings in, 1177.
- new trials and appeals in, 1178.
- relief of tenant against forfeiture, 1179.

- Foreign resident**—summons, how served on, 412.

See ABSENTEE.

Foreclosure—place of trial in actions for, 392.

- intervention, 387.
- lis pendens*, 400.
- receiver, 564.
- proceedings in action for, 726.
- surplus after sale, how disposed of, 727.
- proceedings in actions on installment loans, 728.
- injunction, 745.
- receiver may be appointed in, 564.
- remedy by, is exclusive, 744.
- fixtures, 745.
- mortgagee in possession, 744.
- tender, 997.
- when action lies against decedent's estate, 1493, 1500.
- See MORTGAGE.

- Foreign will**—proceedings in probate of, 1322-1324.
See **WILLS**.
- Forfeiture**—limitation of action for, 346.
place of trial in actions for, 393.
on sale under execution, without notice, 693.
liability of sheriff, 697.
form of action, 307.
of lease, relief against, 1179.
- Franchise**—actions for usurpation of, 802-809.
See **USURPATION OF OFFICE**.
- Fraud**—a ground for arrest, 479.
- Frauds**—see **STATUTE OF**.
- Furniture**—exempt from execution, 690.
- Future**—included in present tense, 17.
- Garnishee**—citation to issue to, 545.
memorandum to be furnished by, 546.
when liable to plaintiff, 544.
to be served with notice of attachment, 543.
property, how attached in hands of, 542.
See **ATTACHMENT**.
- Garnishment**—see **ATTACHMENT**.
- Gold coin**—legal tender notes receivable as, 667.
- Gold dust**—return on execution, 688.
See **JUDGMENT**.
- Governor**—to appoint, in case of absence or incapacity of judge, 160.
may require superior judge to hold court, 160.
- Grading**—see **LIENS, ENFORCEMENT OF**.
- Grand jury**—defined, 192.
ballot-box, 209.
drawing, 214-220.
when to be impaneled, 241.
how constituted, 242.
panel, how filled, 242.
proceedings regulated by Penal Code, 243.
- Growing timber**—action for trespass for cutting, 733.
- Guardian**—*ad litem*, of infant, to appear in actions, 372.
how appointed, 373.
how appointed in Justices' Courts, 843.
power of court, how affected by Probate Act, 1759.
- Guardian and ward**—appointment of guardian, how provided for, 304.
general, to appear for infant, 372.
ad litem, in actions, 372.
ad litem, how appointed, 373.
of insane person, in partition, 794.
in Justices' Court cases, 843.
- Guardians of minors**.
service of process on, for removing executor, 1722.
Superior Court to appoint, when, 1747.
petition for appointment, 1747.
minor may nominate, when, and when not, 1748.
power of judge at chambers, 167, 1808.
when appointment made by court, sec. 1749.
nomination by minor after fourteen, 1750.
father and mother entitled to appointment, when, 1751.

Guardian and ward—Continued.*Guardians of minors.*

- minor having no father nor mother, 1752.
- powers and duties of, 1753.
- bond of guardian, 1754.
- letters of, form, and when to issue, 1754.
- order appointing, conditions may be inserted in, 1755.
- letters of, and bond to be recorded, 1766.
- maintenance of minor, how provided for, 1757.
- testamentary guardian to give bond, 1758.
- powers of testamentary guardian limited, 1758.
- powers of court as to appointment of guardians *ad litem*, how affected, 1759.

Guardians of insane and incompetent persons.

- verified petition, what to contain, 1763.
- appointment after hearing, when will be made, 1764.
- powers and duties of, 1765.
- proceeding for restoration of insane, etc., 1766.

Powers and duties of guardians.

- to pay debts of ward out of ward's estate, 1768.
- to recover debts due ward and represent him, 1769.
- to manage ward's estate, 1770.
- to maintain ward, 1770.
- to sell real estate, 1770.
- maintenance of ward, how enforced, 1771.
- may join in assent to partition, 1772.
- must return inventory of ward's estate, 1773.
- appraisers to be appointed, 1773.
- proceedings, on after discovered or acquired property, 1773.
- must make annual and other settlements, 1774.
- allowance of accounts of joint guardians, 1775.
- expenses and compensation of, 1776.
- territorial limits of authority, 1913.

Sale of property and disposition of proceeds.

- may sell property in certain cases, 1777.
- sale of real estate to be made on order of court, 1778.
- application of proceeds of sale, 1779.
- proceeds, how to be invested, 1780.
- order of sale, how obtained, 1781.
- notice to next of kin, how given, 1782.
- copy of order to be served, or published, 1783.
- on written consent, notice need not be given, 1783.
- hearing of application, 1784.
- who may be examined on hearing, 1785.
- costs, to whom to be awarded, 1786.
- order of sale, what to specify, 1787.
- bond to be given before selling real estate, 1788.
- proceedings to conform to provisions relating to estates of deceased persons, 1789.
- order of sale, limitation to, 1790.
- conditions of sale, of estate of minor heirs, 1791.
- bond and mortgage to be given for deferred payments, 1791.
- court may order investment of money, 1792.

Non-resident guardians and wards.

- guardians of non-resident persons, 1793.
- powers and duties of, 1794.
- to give bonds, 1795.
- to what guardianship to extend, 1796.
- removal of non-resident ward's property, 1797.
- notice, and proceedings on removal, 1798.
- order of removal to be made, 1798.
- discharge of person in possession, 1799.
- embezzlement by, 1800.

Guardian and ward—Continued.*General and miscellaneous provisions.*

- examination of person suspected of defrauding ward, 1800.
- or of concealing ward's property, 1800.
- removal and resignation of guardian, 1801.
- surrender of estate, 1801.
- guardianship how terminated, 1802.
- new bond when required, 1803.
- bond to be filed, action on, 1804.
- limitation of action on guardian's bond, 1805.
- limitation for recovery of property sold, 1806.
- more than one guardian may be appointed, 1807.
- order appointing guardian, how entered, 1808.
- undertakings, requisites of, 1809.

Habeas corpus—jurisdiction, issuance of writ, 51, 76.

Handwriting—how proved, 1943.

- evidence respecting, how given, 1944.
- comparisons of, how made, 1945.
- entries of decedents as evidence, 1946.
- proof of, when admitted in probate of will, 1315.

Highways—damages, for trespass on, 733.

- measure of damages, 734.

Holidays—defined, 10.

- non-judicial days, 134.

Homestead—setting apart to survivor, 1474, 1486.

See ESTATES OF DECEASED PERSONS.

Householder—property of, exempt from execution, 690.

Husband—not liable for debts of sole trader, 1821.

- when not to be witness against wife, 1881.
- when, must testify, 1882.
- when to be joined with wife as party, 370.

Immaterial—errors, may be disregarded, 475.

Impeachment—court for trial of, how composed, 36.

- jurisdiction of, 36.
- officers of court, 37.
- trial, provided for in Penal Code, 38.

Imprisonment—effect of, on limitation of actions, 352.

- of judgment debtor, when may be, 715.
- for contempt of court, 1219.
- for disobedience of mandate, 1097.

See DISCHARGE FROM IMPRISONMENT.

Improvements—value of, when allowed as set-off, 741.

- estimation of value of, in eminent domain, 1248.
- when not assessed in eminent domain, 1249.

Inadvertence—relief from by amendment, 473.

Inconsistent statutes—Code repeals, 18.

Indemnity—action against sheriff, 1055.

Indirect evidence—defined, 1832.

See EVIDENCE.

Indispensable evidence—defined, 1836.

See EVIDENCE.

Infant—to appear by guardian, 372.

- effect of infancy, on limitation of actions, 328, 352.

Infant—Continued.

- summons, how served on, 411.
- one year after removal of disability given to infant to contest probate of will, 1233.
- letters of administration *durante minore etate*, 1354.
- share of, on partition, to be paid to guardian, 793.
- share of, on partition, securities may be taken, 777.
- effect of infancy, on claim to escheated estates, 1272.
- who entitled to guardianship of, 1751.

Inference—defined, 1368.
on what founded, 1900.

- Injunction—what is, and who may grant, 525.**
 - when it may be granted, 526.
 - at what time, may be granted, 527.
 - what required to obtain, 527.
 - after answer, upon notice, 528.
 - security required upon, 529.
 - order to show cause, 530.
 - to suspend business of corporation, how and by whom granted, 531.
 - motion to vacate or modify application, how made, 532.
 - when will be vacated, 533.
 - limitation not to run, 356.
 - to restrain injury during foreclosure, 745.
 - to restrain injury after execution, 745.
 - to restrain injury during probate, 1341.

- Injuries—civil action arises from, 25.**
 - kinds of, enumerated, 27.
 - to property, defined, 28.
 - to person, defined, 29.
 - child, father, mother, or guardian may sue for, 376.
 - action for death or, 377.
 - claims for, may be united, 427.
 - place of trial in actions for, 395, 832.
 - liability of steamers and vessels for, 813.
 - liability, on entry for survey of land, 743.
 - liability for, after sale on execution, 746.

Inquest—jury of, what, 195.
impanelling jury of, 254.

- Insane persons—guardian *ad litem*, 372.**
 - when guardian may be appointed for, 1763.
 - appointment of, on hearing, 1764.
 - powers and duties of guardians of, 1765.
 - proceedings for restoration of, 1768.
 - guardians to recover share of, on partition, 794.
 - may consent to partition and execute release, 795.
 - service of summons on, how made, 411.
 - cannot be witnesses, 1880.

- Insanity—effect of, on limitation of actions, 352.**
effect of, on claim to escheated estates, 1272.

- Insolvency—proceedings under statute to continue, 1822.**
jurisdiction in actions of, 78.

Subject in general.

- insolvent may be discharged, 1, p. 645.
- compliance with act, required, 1, p. 645.
- act, how known and cited, 1, p. 645.

Voluntary insolvency.

- application for discharge, how made, 2, p. 645.
- amount of debts required, 2, p. 645.

Insolvency—Continued.*Voluntary insolvency.*

- essential averments in petition, 2, p. 645.
- schedule and inventory to be annexed, 2, p. 645.
- effect of filing petition, 2, p. 645.
- schedule, what to contain, 3, p. 646.
- statement of debts, etc., 3, p. 646.
- inventory, what to contain, 4, p. 646.
- estate of petitioner, what included, 4, p. 646.
- petition, schedule, and inventory to be verified, 5, p. 646.
- form of affidavit to be taken, 5, p. 646.
- order of court on filing petition, what to contain, 5, p. 646.
- sheriff to take possession of estate, 6, p. 647.
- effect of order on pending proceedings, 6, p. 647.
- copy of order to be published, 7, p. 647.
- copy of order to be served on creditors, 7, p. 647.
- money to defray costs, to be deposited, 7, p. 647.

Involuntary insolvency.

- number of creditors required to petition, 8, p. 648.
- aggregate amount of debts, 8, p. 648.
- petition to be verified, etc., where filed, 8, p. 648.
- contents of petition, and amendments, 8, p. 648.
- certain loans not invalidated, 8, p. 648.
- bond to accompany petition, 8, p. 648.
- additional bond, when directed, 8, p. 648.
- order of court, on filing petition for debtor to show cause, 9, p. 649.
- court may forbid payment of debts, 9, p. 649.
- court may forbid delivery of property, 9, p. 649.
- copy, petition, and order to be served on debtor, 10, p. 649.
- service, how made, 10, p. 649.
- renewal of order, supplemental order, 10, p. 649.
- service by publication, when, 10, p. 649.
- debtor may demur to petition, when, 11, p. 650.
- answer on demurrer, overruled, 11, p. 650.
- answer, requisites of, 11, p. 650.
- proceedings, how conducted, 11, p. 650.
- order on default of debtor, or on trial of issue, 12, p. 650.
- order on debtor to file schedule and inventory, 12, p. 650.
- proceedings thereon, how conducted, 12, p. 650.
- proceedings, when dismissed, 13, p. 650.
- respondent debtor, when to recover costs, 13, p. 650.
- when sheriff or assignee to prepare schedule and inventory, 14, p. 650.

Assignees.

- meeting of creditors to elect, 15, p. 651.
- clerk of court to keep minutes of meeting, 15, p. 651.
- assignee, qualifications of, 15, p. 651.
- bond to be filed by, 15, p. 651.
- sureties on bond, when to justify, 15, p. 651.
- bond may be sued by any creditor aggrieved, 15, p. 651.
- court when to appoint assignee, 16, p. 651.
- clerk of court to assign estate to assignee, when, 17, p. 651.
- what estate vests in assignee, 17, p. 651.
- effect of assignment on attachments, 17, p. 651.
- right of assignee to recover estate, 18, p. 652.
- assignee to prosecute pending actions, 18, p. 652.
- certified copy of assignment evidence of authority, 18, p. 652.
- assignee to record copy of assignment, where, 19, p. 652.
- record or certified copy thereof as evidence, 19, p. 652.
- assignee may resign appointment, 20, p. 652.
- when court may revoke appointment, 20, p. 652.
- revocation not to affect liability, 20, p. 652.
- powers of assignee enumerated, 21, p. 653.

Insolvency—Continued.**Assignees.**

- books of debtor to be deposited in court, 22, p. 654.
- debtor to deliver all papers and securities, 22, p. 654.
- books and papers to be handed to assignee, 22, p. 654.
- persons liable for double amount of property embezzled, 23, p. 654.
- assignee to recover for property embezzled, 23, p. 654.
- penalties, forfeitures, and proceedings in case of embezzlement, 24, p. 654.
- what sections of Code to apply, 24, p. 654.
- assignees to convert estate into money, 25, p. 655.
- to keep accounts accessible to creditors, 25, p. 655.
- private sales, when allowed, 25, p. 655.
- notice of sale by publication, 25, p. 655.
- perishable property, sale of, 26, p. 655.
- sale of outstanding debts, 27, p. 655.
- expenses allowed to assignees, 28, p. 655.
- commissions allowed, 28, p. 655.
- statement to be furnished in three months, 29, p. 656.
- statement, what to contain, 29, p. 656.
- further accounts, when made, 29, p. 656.
- court may require accounting and distribution, 30, p. 656.
- creditors entitled to share funds *pro rata*, 31, p. 656.
- proof required of bail or surety of debtor, 31, p. 656.
- dividends already declared not disturbed, 32, p. 656.
- subsequent debts, proved, right to distribution, 32, p. 656.
- discharge of assignee for refusal to account or pay over dividends, 33, p. 656.
- discharged assignee to deliver estate, etc., to court, 33, p. 656.
- final account, auditing and settlement, 34, p. 657.
- distribution of estate and discharge of assignee, 34, p. 657.

Partnerships and corporations.

- partners may be adjudged insolvents, 35, p. 657.
- petition, number of creditors, 35, p. 657.
- order to show cause to issue, 35, p. 657.
- what property to be taken, 35, p. 657.
- creditors to prove debts and choose assignee, 35, p. 657.
- assignees to keep separate accounts, 35, p. 657.
- proceeds, how applied, 35, p. 657.
- certificate of discharge, 35, p. 657.
- parts of acts applicable, 35, p. 657.
- petition for adjudication, where filed, 35, p. 657.
- partners not joining in to show cause, 35, p. 657.
- what provisions of act to apply, 36, p. 658.
- to apply to every officer of a corporation, 36, p. 658.
- property to be distributed, but no discharge granted, 36, p. 658.

Proof of debts.

- what debts may be proved, 37, p. 659.
- rebate of interest, 37, p. 659.
- demands for goods converted by debtor, may be proved, 38, p. 659.
- contingent liabilities of debtor, when may be proved, 39, p. 659.
- creditor may claim contingent credits and share dividends, 40, p. 659.
- bail, surety, or guarantor of debtor, entitled to prove, 41, p. 659.
- bail, surety, etc., stand in place of creditor, 41, p. 659.
- creditor may prove debts due at stated periods, 42, p. 660.
- mutual debts and credits, accounts to be stated, 43, p. 660.
- set-off and counter-claim, 43, p. 660.
- mortgage or pledge, value of claim how ascertained, 44, p. 660.
- pledged property to be sold, 44, p. 660.
- releases and deeds to be made, 44, p. 660.
- when creditor not allowed to prove, 44, p. 660.

Insolvency—Continued.*Proof of debts.*

- creditor, when not allowed to prove, 45, p. 660.
- valid liens not affected, 45, p. 660.
- right of action, when not waived, 45, p. 660.
- proceedings not to be prosecuted, 45, p. 660.
- proceedings stayed, 45, p. 660.
- when judgment may be taken, 45, p. 661.
- suits may be prosecuted if undertaking given, 45, p. 661.
- penalty for accepting preference, 46, p. 661.
- dividend not to be paid till surrender of security, 46, p. 661.
- debtor and others may be examined, 47, p. 662.
- examinations, how conducted, 47, p. 662.

Discharge.

- when debtor may apply for, 48, p. 662.
- notice of application to be given, 48, p. 662.
- notice, when not necessary, 48, p. 662.
- when not granted, 49, p. 662.
- oath to be taken before discharge, 49, p. 662.
- opposition to discharge, pleadings, and trial of issue, 50, p. 664.
- certificate of discharge, when issued, 51, p. 664.
- form of certificate of discharge, 51, p. 664.
- fraudulent debts, etc., not discharged, 52, p. 664.
- joint debts not discharged, 52, p. 664.
- from what it releases, 53, p. 664.
- as *prima facie* evidence, 53, p. 664.
- may be contested, and be set aside by court, 53, p. 664.
- refusal to grant discharge, 54, p. 665.
- refusal not to affect administration of estate, 54, p. 665.

Fraudulent preferences and transfers.

- transfers in contemplation of insolvency, 55, p. 665.
- assignee may recover back property, 55, p. 665.

Penal clauses.

- offenses against the act, 56, p. 666.
- punishment for fraud on part of debtor, 56, p. 666.

Miscellaneous.

- death of insolvent not to abate proceedings, 57, p. 667.
- Statute of Limitations, when not to run, 58, p. 667.
- representation by attorney, 59, p. 667.
- exemptions for benefit of insolvent, 60, p. 667.
- homestead to be set apart, 60, p. 667.
- commencement of proceedings, 61, p. 667.
- construction of words used in act, 62, p. 667.
- when receiver may be appointed, 63, p. 668.
- application of Code of Civil Procedure, 64, p. 668.
- proceedings when property attached, 65, p. 668.
- costs to be allowed, 65, p. 668.
- when a preferred claim, 65, p. 668.
- petition may be dismissed, 66, p. 668.
- appeals to Supreme Court, 67, p. 669.
- repeal of conflicting acts, 68, p. 669.

Inspection of writings—refusal of, its effect, 449.

- may be demanded, 1000.
- order of survey of real property, 742, 743.
- every citizen entitled to inspect and copy public writings, 1392.
- party inspecting not bound to produce writing in evidence, 1939.
- docket of judgment to be always open for inspection, 673.
- produced by witness to refresh his memory, 2047.
- writing shown witness may be inspected by adverse party, 2054.

Instructions to jury—charge, what to state, 608.

- what must be furnished on request, 608.
- as to findings of fact, 625.

- Instructions to jury—Continued.**
 jury may return for further, 614.
 special, how given, 609.
 as to evidence, 2061.
 may be given on holidays, 134.
- Instruments in writing—See PRIVATE WRITINGS, WRITTEN INSTRUMENTS.**
- Insufficiency—of facts, ground for demurrer, 430.**
 of evidence, ground for new trial, 657.
- Insurrection—change of place of holding court, on account of, 142.**
- Interest—and costs, form part of judgment, 1035.**
 rebate on foreclosure, 728.
- Interested—judge when, disqualified, 170.**
- Interpleader—other person may be substituted for defendant, 334.**
 proceedings on substitution, 334.
- Interpreter—when may be sworn in actions, 1884.**
- Intervention—when it takes place, and how made, 387.**
 parties may be brought in, 387.
- Irregularity—of proceedings, ground for new trial, 657.**
 effect of, in proceedings on judicial sale, 706.
- Irrelevant matter—may be stricken out, 453.**
- Interrogatories—annexed to commission to take testimony, 2025.**
 See EVIDENCE.
- Issues—definition, kinds of, 588.**
 of law, how raised, 539.
 of fact, how raised, 590.
 of law, how tried, 591.
 judgment on, 636.
 of fact, how tried, 592.
 of law, to be first disposed of, 592.
 cases to be placed on calendar, 593.
 parties may bring, to trial, 594.
 postponement of trial of, 595.
 proceedings to defeat postponement, 596.
 special, 309.
 in partition suits, 759.
 in mandate, when may be tried by jury, 1090.
 in proceedings against joint debtors, 994.
 in forcible entry and detainer, 1171.
 in Justices' Courts, defined, 878.
 of law, how raised, 879.
 of fact, how raised, 880.
 of law, how tried, 881.
 of fact, how tried, 882.
 trial of fact by jury, how waived, 631.
 how waived in Justices' Courts, 883.
 trial of issues by referees, 638.
 See TRIAL.
- Items of account—need not be set out in pleading, 454.**
- Joinder—See PARTIES, CAUSES OF ACTION.**
- Joint authority—majority may act, 15.**
- Joint debtors—proceedings against, parties not summoned, 969.**
 summons, what to contain and how served, 990.
 affidavit to accompany summons, 991.
 answer, when filed and what to contain, 992.

Joint debtors—Continued.

- pleadings, what constitute, 993.
- issues, how tried, 994.
- verdict, what to be, 994.
- judgment, where some defendants only are served, 414.
- contribution, 709.
- proceedings against those not served, 989-994.

Judges—of Superior Courts, elections, 65.

- counties having two or more, 66.
- of San Francisco, 67.
- terms of office, 68.
- computation of years of office, 69.
- vacancies in office of, 70.
- courts held by other, 71.
- pro tempore*, 72.
- supreme, qualifications of, 156.
- superior, qualifications of, 157.
- superior, residence of, 158.
- holding courts at request of governor, 160.
- ineligibility of, 161.
- powers of, at chambers, 166, 176.
- when disqualified to act, 170.
- not to act as attorney, 171.
- must not have attorney for partner, 172.
- powers of, out of court, 176.
- powers of, as to conduct of proceedings, 177.
- to punish for contempt, 178.
- to take acknowledgments, 179.
- to refuse subsequent application for orders, 182.
- proceedings not to be affected by vacancy, 184.
- shall have means to carry jurisdiction into effect, 187.
- when not to act as executors, 430.
- when disqualified, proceedings transferred, 431.
- may present claim against estate of deceased, 495.
- relieved from office, to settle exceptions, 653.
- may be a witness, 1883.

See TERM OF OFFICE.**Judgment—definition of, 577.**

- against whom may be given, 578.
- against administrator, etc., 1504.
- against attorney at law, for suspension or removal, 299.
- against one of several debtors, costs may be severed, 1026.
- against one, and action proceed as to others, 579.
- against married woman in forcible entry, 1164.
- against sheriff for official acts, conclusive on sureties, 1055.
- against decedent, when not a lien, 1506.
- award, when it has effect of, 1286.
- by default generally, 585.
- confession by, 1132-1134.
- by default, relief against, 473.
- by default on amended complaint, 432.
- by default in forcible entry, 1169.
- costs, when allowed to plaintiff, 1022.
- costs, when allowed to defendant, 1024.
- costs, when allowed to one of several defendants, 1026.
- costs, to be included on judgment, 1035.
- costs on appeal, in discretion, 1027.
- currency in, 667.
- docket of, effect of, 899.
- deposit, to be applied to satisfy, 500, 550.
- estoppel, 1908.
- effect of, upon rights of parties, 1908.

CODE CIV. PROC.—61.

Judgment—Continued.

- effect of, against discharged prisoner, 1152.
 - errors to be disregarded, 473.
 - effect of appeal from, 1176.
 - effect of death after verdict, 669, 1506.
 - for contempt, final, 1222.
 - final, may be appealed from, 939.
 - final, in District Court—appeal from, 963.
 - how enforced, after five years, 635.
 - how pleaded, 456.
 - how reviewed, 935, 937.
 - in Justices' Court, not a lien unless recorded, 900.
 - interest and costs to be included in, 1035.
 - in Supreme Court, concurrence necessary, 47.
 - may be appealed from, 939.
 - may be filed and docketed in other county, 898.
 - memorandum of costs to be furnished, 1033.
 - modified on appeal, costs in discretion, 1027.
 - on counter-claim, 666.
 - of dismissal and nonsuit, 581.
 - of dismissal against non-resident, 1037.
 - of justices, abstract of, 897.
 - of Justices' and Police Courts, how appealed from, 974.
 - on appeal from inferior court, may be appealed from, 939.
 - on answer filed, relief granted, 580.
 - on failure to answer, relief granted, 580.
 - on failure to answer, in what cases granted, 585.
 - on demurrer, 636.
 - on confession, how entered, 1134.
 - on submission of controversy, 1139.
 - on the merits, 582.
 - on report of referee in partition, 766.
 - on usurpation of office, 808.
 - on review of case, 1075.
 - on review, what constitutes, 1077.
 - on appeal, part of judgment roll, 958.
 - on appeal, remittitur to be certified by clerk, 958.
 - renewal of, in foreclosure, on eviction of purchase, 708.
 - satisfaction of, under attachment, 550.
 - Supreme Court always open to render, 48.
 - Supreme Court to render within six months, **note under 50.**
 - what deemed adjudged on former judgment, 1911.
 - what rights determined, in actions for usurpation, 808.
 - when reversed, restitution to be made, 957.
 - when conclusive, 1908.
 - when conclusive in foreclosure, 726.
 - what treatment of, constitutes contempt, 1209.
 - appeal from, 939.
- Manner of giving and entering.*
- book, to be kept by clerk, 668.
 - case may be brought for argument, 665.
 - docket, how kept and contents of, 672.
 - docket, to be open for inspection, 673.
 - gold coin or currency, 667.
 - lien of, defined, 671.
 - no lien on estate where death occurred after verdict, 1506.
 - roll, what to constitute, 670.
 - satisfaction of, how made, 675.
 - transcript of, may be filed in any county, 674.
 - to be entered within twenty-four hours, 664.
 - upon death after verdict, not to be a lien, 669.
 - when counter-claim exceeds demand, 666.

Judgment—Continued.*In particular actions.*

- in general, what is, 577.
- in replevin, to be an alternative, 667.
- in special proceedings, defined, 1064.
- in actions to quiet title, 740.
- in contested elections, 1122.
- in controversy without action, 1139.
- in escheated estates, 1271.
- in forcible entry and detainer, by default, 1169.
- in forcible entry, on verdict, 1174.
- in foreclosure, 726.
- in actions for usurpation of office, 805.
- in usurpation—fine may be imposed, 809.
- in partition suits, 759.
- in partition, effect of, 767.
- in partition, how enforced, 684.
- in election contests, 1122.
- in mandate, to be granted, 1095.
- in actions for enforcement of liens, 1192.
- in liens, what to include, 1193.
- in liens, rank of liens, 1194.
- in liens, docketed for deficiency, 1195.
- in proceedings relative to escheated estates, 1271.
- in proceedings to contest probate, 1314.
- in proceedings to declare wife sole trader, 1817.
- in contempts, fine imposed, 1218.
- on confession without action, 1132-1135.

In Justices' Courts.

- on confession in Justices' Courts, 889.
- dismissal in Justices' Courts, 830.
- on verdict in Justices' Courts, 891.
- on demurrer in Justices' Courts, 892.
- on offer to compromise, 895.
- costs in, 896.
- abstract of, in Justices' Courts, 897.
- abstract to be filed and docketed, 898.
- costs, allowed in Justices' Courts, 896.
- docket of justice, effect of, 899.
- docket not a lien unless abstract is recorded, 800.
- excess of, remitted to save jurisdiction of justice, 894.
- on trial in Justices' Courts, 892.
- on offer to compromise in Justices' Courts, 895.
- when defendant subject to arrest, 893.

Judgment book—to be kept by clerk, 663.
 confession of judgment to be entered in, 1134.

Judgment debtor—execution may issue against, 682.
 execution after death of, 686.
 property of, exempt, 690.
 may indicate property to levy on, 691.
 may direct order of sale, 694.
 may redeem property sold, when, 702.
 to whom payments to be made, 704.
 supplementary proceedings against, 714.
 may be imprisoned, when, 715.
 debtor of, may pay creditors' claim, 716.
 may be punished for contempt, 721.
 earnings of, when exempt from execution, 690.

Judgment roll—what to contain, 670.
 to contain judgment on appeal, 958.
 what constitutes, in proceedings for dissolution, 1233.

- Judicial days**—what are, 133.
 non-judicial days, 134.
 See **ADJOURNMENT**.
- Judicial evidence**—defined, 1823.
- Judicial notice**—one kind of evidence, 1827.
 facts of which court will take, 1875.
- Judicial officers**—in general, 156-161.
 may take acknowledgments and affidavits, 179.
 may take depositions in this State, 2031.
 exempt from jury duty, 200.
 incidental powers and duties of, 176-179.
 powers of, out of court, 178.
 enumeration of powers, 177.
 may punish for contempt, 178.
 what acts are contempts, 1209.
 subsequent application for orders, prohibited, 182.
 subsequent applications, a contempt, 183.
 proceedings not affected by vacancy, 184.
 proceedings to be in English, 185.
 abbreviations and figures, 186.
 power to enforce exercise of jurisdiction, 187.
- Judicial powers**—by special investment, 190.
- Judicial record**—defined, 1904.
 how authenticated, as evidence, 1905.
 of foreign country, how authenticated, 1906.
 foreign, what must contain, 1906.
 copy of, of foreign country, 1907.
 effect of judgment upon rights, 1908.
 effect of judicial orders, when conclusive, 1909.
 when parties to be deemed the same, 1910.
 what deemed adjudged in, judgment, 1911.
 where sureties bound, principal is also, 1912.
 of sister State, its effect, 1913.
 of court of admiralty, 1914.
 of foreign judgment, its effect, 1915.
 manner of impeaching, 1916.
 jurisdiction required to sustain, 1917.
 justices' judgment in other State, how proved, 1921.
 See **EVIDENCE**.
- Judicial remedies**—defined, 20.
 how divided, 21.
- Jurisdiction**—acquired by voluntary appearance, 416.
 demurrer for want of, 430.
 not waived by not raising objection, 434.
 of judicial officers, to take acknowledgments, etc., 179.
 includes necessary means to enforce, 187.
 in change of name, 1275.
 in escheated estates, 1269.
 in proceedings on confession of judgment, 1132.
 in insolvency cases, 76.
 in cases for breaches of the peace, 115.
 in proceedings for change of names, 1275.
 in proceedings for condemnation of land, 1243.
 in proceedings relative to escheated estates, 1269.
 over estate in several counties, 1295.
 of Court of Impeachment, 37.
 of Supreme Court, 50-53.
 of Superior Courts, 75-77.
 of Justices' Courts, 112-115.
 of Justices' Courts, territorial limit, 106.

Jurisdiction—Continued.

- of Justices' Courts, civil, 112.
- of Justices' Courts, concurrent, 113.
- of Justices' Courts, civil, restricted, 114.
- of Justices' Courts, criminal, 115.
- of Police Courts, 121, 332.
- means to carry into effect, 187.
- when acquired, 416.
- want of, a ground for demurrer, 430.
- want of, ground for impeachment of record, 1916.
- what required to sustain record, 1917.

Juror—qualifications of, who competent, 196.

- disqualification of, 199.
- may be witness, when, 1883.
- who exempt from service as, 200.
- affidavit of claim to exemption, 202.
- discharge of, for sickness at trial, 615.
- affidavit of, to impeach verdict, 657.
- who may be excused, 201, 615.
- failure to attend, 238.
- oath, 604.

Selecting and returning, for courts of record.

- list of persons to serve as, to be made, 204.
- selection, how made, 205.
- lists, what to contain, 206.
- list to be placed with clerk, 208.
- duty of clerk on receiving list, 209.
- regular jurors to serve one year, 210.
- jurors to be drawn from boxes, 211.

Drawing, time and manner of.

- how drawn, 211.
- to be drawn upon order of judge, 214.
- clerk to draw in presence of court, 215.
- number to be drawn, 214.
- drawing, how conducted, 219.
- disposition to be made of ballots, 220.

Manner of summoning jurors.

- sheriff, how to summon, 225.
- special drawing and summoning may be ordered, 226.
- summoning to complete panel, 227.
- compensation of ellor for summoning, 228.
- jurors for Justices' and Police Courts, by whom summoned, 230.
- how summoned, 231.
- return of officer, 232.
- juries of inquest, how summoned, 235.
- obedience, to summons, how enforced, 238.

Impaneling jurors.

- of grand jury, when to be impaneled, 241.
- how constituted, 242.
- impaneling under Penal Code, 243.
- clerk to call list of trial jurors, 246.
- manner of impaneling, 247.
- proceedings on forming, in courts not of record, 250.
- manner of impaneling, 251.
- impaneling juries of inquest, 254.

Jury—defined, 190.

- different kinds of, 191.
- grand, 192.
- for trials, defined, 193.
- for trials, of what to consist, 194.
- of inquest, defined, 195.
- how summoned, 235.

Jury—Continued.

- ballot-box, 1208.
- when grand jury to be impaneled, 241.
- grand jury, how constituted, 242.
- to be impaneled as prescribed in Penal Code, 243.
- impanneling trial jury, clerk to call list, 246.
- manner of impanneling trial jury, 247.
- jury, how drawn, 214-220, 600.
- challenges, four peremptory allowed, 601.
- grounds of challenge for cause, 602.
- challenge for cause, how tried, 603.
- jury to be sworn, form of oath, 604.
- on trial of right of property, levied on, 689.
- how obtained in contest of probate of will, 1313.
- how, and when may be waived, 631.
- how waived in Justices' Courts, 883.
- may try facts not in issue, when, 309.
- may be conducted to view property, 610.
- admonition on separation, 611.
- may take certain papers on withdrawing, 612.
- charge to, 608, 609, 2102.
- further charge, 614.
- deliberations of, how conducted, 613.
- three-fourths may render verdict, 613.
- discharge of, 616.
- while out, court may adjourn, 617.
- polling, 618.
- verdict of, what is, 624.
- when may correct informal verdict, 619.
- in contest of probate of will, 1313.
- See FINDINGS, VERDICT.

Jury lists—by whom and when made, 204.

- selections, how made, 205.
- to contain how many names, 206.
- to be placed with clerk, 208.
- duty of clerk—jury-box, 209.
- regular jurors to serve one year, 210.
- jurors to be drawn from box, 211.

Justices' Courts—*In cities and counties.*

- courts and justices, 85.
- clerk of, 86.
- sheriff and deputies, *ex-officio* officers, 87.
- officers, and office hours, 88.
- actions in, 89.
- reassignment and transfer of actions, 90.
- payment of fees, 91.
- transcripts and other papers, 92.
- dockets, 93.
- jurisdiction, territorial extent, 94.
- practice and rules, 95.
- clerk of, not to act as attorney, 96.
- salaries, 97.
- what justices successors of others, 98.

In townships.

- at least one in each township, 103.
- where held, 104.
- what justice may hold for another, 105.
- territorial jurisdiction, 106.
- what justices successors of others, 107.

In general.

- terms of office, 110.

Justices' Courts—Continued.*In general.*

- vacancies, how filled, 111.
- civil jurisdiction of, 112.
- concurrent jurisdiction of, 113.
- civil jurisdiction restricted, 114.
- criminal jurisdiction of, 115.
- justice, where to reside, 159.
- disqualification to sit or act, 170.
- not to practice before Justices' Court, 171.
- not to have attorney for partner, 172.
- may take acknowledgments and affidavits, 179.
- jurors for, 230.
- how summoned, 231.
- return of officer, 232.
- proceedings in forming jury, 250.
- manner of impanelling, 251.
- transfer of cases to Superior Courts, 838.
- may issue subpoenas and final process, 919.
- blanks in papers to be filed, except subpoenas, 920.
- justices to receive moneys and pay to parties, 921.
- in case of disability, another justice may attend, 922.
- may require security for costs, 923.
- who entitled to costs, 924.
- what provisions of Code applicable to, 925.
- may receive deposit in lieu of undertaking, 926.

Place of trial of actions in.

- in what township or city may be commenced, 832.
- place may be changed in certain cases, 833.
- limitation on right to change, 834.
- to what court transferred, 835.
- proceedings after order changing venue, 836.
- effect of order changing venue, 837.
- transfer of cases to District Court, 838.

Actions, how commenced in.

- by filing complaint and issuance of summons, 839.
- summons may issue within a year, 840.
- issuance of summons, how waived, 841.
- appearance, by attorney or in person, 842.
- guardian, how appointed, 843.
- summons, how issued, and what to contain, 844.
- time for defendant to appear, 845.
- alias summons, when may issue, 846.
- several alias, may be issued, 847.
- limitations upon time of service, 848.
- summons, by whom, and how served, 849.
- hour given for appearance, 850.

Pleadings in.

- form of, 851.
- what constitutes the, 852.
- complaint defined, 853.
- when demurrer may be put in, 854.
- answer, what to contain, 855.
- omission to set up counter-claim, effect of, 856.
- when plaintiff may demur to answer, 857.
- proceedings on demurrer, 858.
- amendment of pleadings, when allowed, 859.
- costs on allowance of amendments, when, 859.
- time in which to demur or answer to amended pleadings, 860.

Arrest and bail.

- order of arrest, and arrest of defendant, 861.
- affidavit and undertaking for order, 862.
- defendant arrested, must be taken before justice, 863.

Justices' Courts—Continued.*Arrest and bail.*

- officer to give notice to plaintiff of arrest, 864.
- officer to detain defendant, 865.

Attachment.

- writ to issue upon affidavit, 866.
- undertaking required, 867.
- writ. substance of, 868.
- undertaking may be taken by officer, 868.
- provisions applicable to justices' attachments, 869.

Claim and delivery.

- how enforced, 870.

Judgment by default.

- on failure of defendant to appear, 871.
- on demurrer, 872.

Time of trial and postponements.

- when trial must commence, 873.
- postponement on motion of court, 874.
- postponement by consent of parties, 875.
- postponement on application of party, 876.
- conditions imposed for postponement, 877.

Trials, conduct of.

- issues, defined, 878.
- issues of law, defined, 879.
- issue of fact, defined, 880.
- issue of law, how tried, 881.
- issue of fact, how tried, 882.
- jury, how waived, 883.
- trial to proceed if either party fails to appear, 884.
- challenges, peremptory and for cause, allowed, 885.
- inspection and copy of writing may be ordered, 886.
- genuineness of signatures, when deemed admitted, 887.

Judgments other than by default.

- by confession, 889.
- by confession, proceedings on, 1135.
- of dismissal, without prejudice, 890.
- upon verdict, when to be entered, 891.
- on trial by court, when to be entered, 892.
- on arrest, what fact must be stated, 893.
- sum in excess of jurisdiction may be remitted, 894.
- on offer of compromise before action, 895.
- costs to be included in, 896.
- abstract of, form of, 897.
- abstract to be filed and docketed, 898.
- execution thereon may issue, when, 899.
- not a lien on lands unless recorded, 900.

Appeals from.

- to Supreme Court, 964.
- to Superior Court, 974-980.

Execution.

- may issue within five years, 901.
- contents of, 902.
- how renewed, 903.
- duty of officer receiving, 904.
- supplementary proceedings on, 905.

Contempts in.

- justice may punish for, 906.
- in immediate view of justice, how punished, 907.
- not in immediate view, warrant to issue, 908.
- punishments for, extent of, 909.
- conviction to be entered in the docket, 910.

Dockets of justices.

- what to contain, 911.

Justices' Courts—Continued.*Dockets of justices.*

- entries in, primary evidence of fact, 912.
- index must be kept, 913.
- must be delivered to successor by county clerk, 914.
- proceedings on vacancy of office, and before appointment, 915.
- justice may issue process on docket of predecessor, 916.
- successor of justice, who deemed, 917.
- superior judge, when to designate, 918.

Justices of peace—in cities and counties, 85.

- criminal jurisdiction, 115.
- election and term of office of, 85.
- extent of civil jurisdiction, 112-114.
- jurisdiction, how restricted, 114.
- disqualifications of, 170.
- not to practice before another, in same county, 171.
- not to have lawyer for partner, 172.
- may take acknowledgments, 179.
- may take affidavits, 179.
- cannot issue writ of review, 1068.
- cannot issue mandate, 1085.
- cannot issue prohibition, 1103.

Justices of Supreme Court—qualifications, 156.

- ineligibility of, 161.
- powers of, at chambers, 165.
- disqualifications of, 170.
- not to practice law, 171.
- not to have partners practicing law, 172.
- powers of, out of court, 176.

Justification—of sureties to undertaking, 1057.

- of sureties, on claim and delivery, 513.
- of sureties, on arrest and bail, 493, 495.
- in defense, to action of libel and slander, 461.
- court commissioners may take, 259.

Laborers—liens of, 1183.

See LIENS, ENFORCEMENT OF.

Land—defined, 17.**Landlord and tenant—adverse possession, 326.**

- may be joined as defendants, 379.
- notice of proceedings to be given tenant, 379.
- unlawful detainer, 1161.

Law of evidence—defined, 1825.**Laws—are either written or unwritten, 1825.**

- written law defined, 1896.
- Constitution and statutes, 1897.
- public and private statutes defined, 1898.
- unwritten law defined, 1899.
- books containing, admissible in evidence, 1900.
- how authenticated, 1901.

Laws—oral evidence of foreign laws, 1902.

- recitals in statutes, how far evidence, 1903.
- See EVIDENCE.

Leasehold—when subject to redemption, 700.**Legal capacity—want of ground for demurrer, 430.****Letters of administration—with will annexed, to be signed by clerk, 1361.**

- how signed and form of, 1362.

Letters of administration—Continued.

- who may obtain, order in which to grant, 1365.
- not to issue to partner, 1365.
- preference of persons equally entitled to, 1366.
- when granted in discretion of court, 1367.
- minor, when entitled, to whom granted, 1368.
- who disqualified, 1368.
- not to issue to married women, 1370.
- to be recorded, 1387.
- when to issue on, foreign will, 1324.
- may be issued on lost will established, 1340.
- when issued after final settlement, 1698.
- special letters may be issued out of term time, 1412.

Application for.

- application for, how made, 1371.
- may be granted at regular or special term, 1372.
- notice of application, 1373.
- contesting application, 1374.
- hearing application, 1375.
- evidence of notice, 1376.
- must be granted, when, 1377.
- proofs required before grant of, 1378.
- may be granted to others than those entitled, 1379.

Revocation of.

- when will be revoked, 1383.
- petition filed, citation to issue, 1384.
- hearing of petition, 1385.
- prior rights of relatives, 1386.
- revocation on subsequent probate of will, 1423.
- See EXECUTORS AND ADMINISTRATORS, WILL.

Letters testamentary—form of, 1360.

- may issue after final settlement, 1698.
- jurisdiction of court in issuance of, 76.

See EXECUTORS AND ADMINISTRATORS.

Letters with will annexed—form of, 1361.

- when to issue, 1350.
- petition for, when to be filed, 1351.
- in case of disability of executor, 1354.
- authority of administrator with, 1356.
- to be signed by clerk, 1356.

See EXECUTORS AND ADMINISTRATORS.

Liability—confession of judgment for contingent, 1133.

- of officer arresting witness, 2068.
- officer, when not liable, 2069.
- of officer on execution sale, limit of, 697.

See SHERIFF.

Libel and slander—how stated in complaint, 460.

- answer in actions for, 461.
- what may be given in evidence, 461.

Libraries—of whom, exempt from execution, 690.**License—of attorney to practice, 277.**

- penalty for practicing without, 281.

Lien—definition of, 1190.

- of mechanics, laborers, etc., 1183-1190.
- for salaries and wages, 1204-1206.
- of judgment not to attach on death of party, 669.
- from time of docketing judgment becomes a, 671.
- of judgment on filing transcript, 674.
- holder of, as purchaser on partition, 786.
- actions for foreclosure of mortgage, 726-728.

See FORECLOSURE.

Liens, enforcement of—***Mechanics and laborers.***

- what property subject to liens, for labor, etc., 1183.
- liens for grading and filling lots and streets, 1184.
- what interest in land subject to lien, 1185.
- effect of lien, 1186.
- claim of lien to be filed in recorder's office, 1187.
- liens upon separate parcels, how designated, 1188.
- claim to be recorded, fees of recorder, 1189.
- time of continuance of lien, 1190.
- service of summons by publication, 1191.
- notice by owner to avoid lien, how given, 1192.
- what contractor entitled to recover, 1193.
- court to declare rank of liens, 1194.
- actions may be consolidated, 1195.
- what allowed as costs, 1196.
- materials furnished not subject to attachment, 1196.
- lien not to impair right of recovery of debt, 1197.
- rules of practice, 1198.
- new trials and appeals, 1199.
- for salaries and wages, assignment of, 1204.
- preferred creditors on assignment of property, 1204.
- preferred creditors against estates, 1205.
- preferred claims on attachment and execution, 1206.
- upon vessels, steamers, and boats, 813-827.

Life estate—termination of, 1723.**Life insurance—policy of, when exempt from execution, 690.****Limitation—of time for issuance of execution, 681.**

- of time for redemption, 702.

- of civil actions, 312.

For the recovery of real property.

- when the people will not sue, 315.
- when action cannot be brought by grantee of State, 316.
- when actions by people, to be brought within five years, 317.
- seizin within five years, when necessary, 318.
- when necessary in actions, or defense arising out of title to, or rents, 319.
- entry on real estate, 320.
- possession, when presumed, 321.
- occupation deemed under legal title, unless adverse, 321.
- occupation, when deemed adverse, 322.
- adverse possession under instrument on judgment, 323.
- actual occupation under claim of title, deemed adverse, 324.
- adverse possession under claim of title not written, what constitutes, 325.
- adverse possession, how affected by relation of tenancy, 326.
- right of possession not affected by descent cast, 327.
- disabilities excluded from time to commence actions, 328.

Of actions other than for recovery of property.

- periods prescribed, 335.
- within five years, 336.
- within four years, 337.
- within three years, 338.
- within two years, 339.
- within one year, 340.
- within six months, 341.
- within six months, claim against county, 342.
- for relief not hereinbefore provided, 343.
- where cause of action accrues on mutual account, 344.
- actions by the people, 345.
- no limitation to actions for recovery of money placed on deposit, following, 345.

Limitation—Continued.*Of actions other than for recovery of property.*

- actions to redeem, 346.
- to redeem part of mortgaged premises, 347.
- to recover money or property deposited with banker, trust company, etc., 348.
- in actions against sheriff, 339, 340.
- for slander, 340.
- against State, 345.
- grantee of State, 316, 317.
- on written instrument executed out of State, 339.
- on statute, 340.
- on liability created by statute, 338.
- to recover stock sold for assessment, 341.
- against supervisors, 342.
- tax collector, 341.
- trespass, trover, 338.

General provisions.

- when an action is commenced, 350.
- exception, where defendant is out of State, 351.
- exception, as to persons under disability, 352.
- provision, where person entitled dies before limitation expires, 353.
- in suits by aliens, time of war to be deducted, 354.
- provisions, where judgment has been reversed, 355.
- provision, where action is stayed by injunction, 356.
- disability must exist when right of action accrued, 357.
- when two or more disabilities exist, etc., 358.
- limitations applicable to actions against directors, 359.
- acknowledgment or new promise must be in writing, 360.
- of time to set aside judgment, and answer to the merits, 473.
- limitation laws of other States, effect of, 361.
- existing causes of action not affected, 362.
- existing statutes, how affected by Code, 9.
- the word "action," how construed, 22, 363.
- claim to escheated estates, 1272.
- contesting will after probate, 1327.
- disability, when available on contest of will, 1333.
- time during vacancy in administration, effect of, 1501.
- action on guardian's bond, 1805.
- for recovery of property sold by guardian, 1806.

Lis pendens—to be filed in real actions, 409.

to be filed in partition, 755.

See NOTICE.

Lost papers—copy of, when may be filed, 1045.**Lost will**—proceedings in probate of, 1338.

See WILL.

Lunatic—limitations, in reference to, 323, 352.

summons, how served on, 411.

escheated estates, 1272.

cannot be witness, 1880.

Mandamus—to be hereafter designated mandate, 106

See MANDATE.

Mandate—defined, 1084.

when, and by what courts issued, 1085.

jurisdiction in Superior Courts, 76.

in Supreme Court, 51.

power of supreme justices to issue writ of, 165.

power of superior judges, 166.

Mandate—Continued.

- writ may issue and be heard at chambers, 1108.
- writ, when and upon what to issue, 1086.
- substance, must be either alternative or peremptory, 1087.
- alternative, when to issue, 1088.
- peremptory, when to issue, 1088.
- adverse party may answer under oath, 1089.
- jury trial, when may be ordered, 1090.
- applicant may demur to, or countervail answer, 1091.
- motion for new trial, where made, 1092.
- provisions to govern new trials on, 1110.
- clerk to transmit verdict to court, 1093.
- hearing on motion, 1093.
- hearing in default of, or insufficiency of answer, 1094.
- damages, costs, and peremptory mandate, when decreed, 1095.
- service of writ, 1096.
- penalty for disobedience of writ, 1097.

Maps and charts—when primary evidence, 1936.

Mariner—proceedings to enforce claims of, 825.
proof of claims of, 826.
See BOATS.

Mark—included in signature or subscription, 17.

Marriage—effect of, on Statute of Limitations, 352.
breach of promise, sittings private, 125.
effect of, on claims to escheated estates, 1273.
no defense in actions for unlawful detainer, 1164.
extinguishes authority of executrix, 1352.
administratrix, effect of, 1370.
how affects limitations, 328, 332.
testimony to establish, may be perpetuated, 2084.

Married woman—when may sue alone, 370.
may defend, in her own right, 371.
may become sole trader, 1811.
as sole trader, responsibilities of, 1820.
proceedings of, on application as sole trader, 1812-1821.
not to be executrix, unless named so in will, 1352.
cannot be appointed administratrix, 1370.
not to be witness against husband, when, 1881.

Masculine—convertible with feminine and neuter, 17.

Material allegations—defined, 463.
only, need be proved, 1867.
evidence to correspond with, 1868.

Material objects—one kind of evidence, 1827.
as evidence, admitted in discretion, 1954.
jury may be taken to view the premises, 610.

Matter—in avoidance, deemed controverted, 462.
redundant, may be stricken out, 453.

Mechanics—property of, what exempt from execution, 690.
liens of, 1183-1199—see LIENS, ENFORCEMENT OF.

Memorandum—of costs, to be furnished, 1033.
of costs, on appeal, 1034.

Merger—remedies not merged, 32.

Metes and bounds—description by, 455.

Miner—property and implements, exempt from execution, 690.

Mining claims—customs, rules, and usages to govern, 748.
liens of mechanics upon, 1183.
how sold, in probate proceedings, 1529.

CODE CIV. PROC.—62.

Mining claims—Continued.

- petition for sale, 1530.
- order to show cause, 1531.
- order of sale, 1532.

Mining customs—proof of, in actions concerning mining claims, 743.**Ministerial officers—election, powers, and duties of, 262.**
conduct of, controlled by law, 123.

See CLERK.

Minor—See INFANT.**Minority—effect of, on limitation of actions, secs. 328, 352.****Misconduct—of jury, ground for new trial, 657.****Misdemeanor—jurisdiction of Justices' Courts in actions for, 115.****Misjoinder—of parties or causes, ground for demurrer, 430.****Mistake—relief from, may be had by amendment, 473.**
in written agreement—evidence, 1856.**Mitigation—may be alleged and proved in libel and slander, 461.****Mob—action for damages by, 340.****Modification—of award by court, when, 1238.**

See AWARD, JUDGMENT.

Month—means calendar month, 17.**Mortgage—not deemed a conveyance, 744.**

See FORECLOSURE.

Mother—may sue for seduction of daughter, when, 375.

- may sue for injury or death of child, when, 376.
- rank in order of persons entitled to administer, 1365.
- when entitled to guardianship of minor, 1751.

Motions and orders—order and motion, defined, 1003.
definition of, applicable to special proceedings, 1064.
where made, 1004.

- notice of motion, at what time to be given, 1005.
- transfer of, to show cause, 1008.
- order for payment of money, how enforced, 1007.
- notices, filing and service of papers, 1010-1017.
- order, service by telegraph, 1017.
- motion for postponement, upon what made, 595.
- motion for discharge of attachment, grounds of, 556.
- motion for new trial, when to be heard, 660.
- motion for new trial in mandate, where made, 1092.
- subsequent applications, when prohibited, 182-183.

See ORDER, NOTICE.

Names—jurisdiction on application for change of, 1275.

- petition for change, 1276.
- hearing and proceedings, 1278.
- clerk to make return to secretary of State, 1279.
- complaint to contain names of parties, 426.
- fictitious names may be used, 474.
- summons, to contain, 407.
- entry of juror's name on verdict, 623.

Negative allegations—when may be proved, 1869.**Neglect—in pleadings, relief from, may be had by amendment, 473.**
action for injury or death caused by, 376, 377.**Negligence—relief from, may be had by amendment, 473.**
resulting in injury or death, who may sue for, 376, 377.**Negotiable instruments—cross demands, in actions on, 440.**
neuter included in masculine, 17.

- Newly-discovered evidence**—ground for new trial, 657.
- New matter**—answer may contain, 437.
 when deemed controverted, 462.
 within what time to demur to, 443.
 when issue arises on, 590.
- New promise**—must be in writing, 360.
- New trial**—defined, 656.
 when, may be granted, grounds for, 657.
 on what papers moved for, 658.
 notice of motion, upon whom served, and what to contain, 659.
 motion to be heard at time specified, or dismissed, 660.
 judge to make written statement on decision of motion, 661.
 record on appeal from order, what constitutes, 661.
 jury resorting to chance, 657.
 verdict against law, 657.
 excessive or insufficient damages, 657.
 insufficient evidence, 657.
 irregularities or misconduct of jury, 657.
 newly-discovered evidence, 657.
 surprise, 657.
 what deemed excepted to, 647.
 motion for, on minutes of court, 659.
 statement, what to contain, 661.
 motion for, in mandate, when to be made, 1092.
 motion for, in prohibition, 1105.
- Non-joinder**—see PARTIES.
- Non-judicial days**—adjournment to, effect of, 134-135.
 holidays, what are, 10.
 falling on Sunday, 11.
 time, how computed, 12.
 performance of acts on holidays, 13.
- Non-resident**—place of trial, in actions against, 395.
 service of summons, how made on, 413.
 pleadings of, by whom, and how verified, 446.
 when allowed to open judgment by default and answer, 473.
 attachment, when may issue against, 538.
 proof required of plaintiff in action, on default of, 585.
 summons in partition suits, how served on, 757.
 proceeds of sales of estates of, in partition, how invested, 788.
 duties of clerk making such investments, 791.
 service of notices and papers on, how made, 1015.
 corporation, to furnish security for costs, 1036.
 effect of failure to furnish such security, 1037.
 limitation, on time to claim escheated estate, 1272.
- Nonsuit**—when judgment of, may be entered, 581.
- Notary public**—seal of, exempt from execution, 690.
 may administer oath or affirmation, 2093.
 may take deposition, in this State, 2031.
- Notice**—after appearance in action, who entitled to, 1014.
 effect of, on priority of liens, 1186.
 for inspection of books and documents, 1000.
 how construed when written, 1865.
 insufficiency of, no ground for dismissal on appeal, 954.
 must be in writing, 1010.
 without title, when valid, 1046.
 not required, to vacate order made out of court, 937.
 of motion, at what time to be given, 1005.
- Service of.*
 how and on whom made, 1010.

Notice—Continued.*Service of.*

- manner of making, 1011.
- by mail, when made, 1012.
- by deposit in post-office, 1013.
- when, need not be made, 1014.
- on attorney, when to be made, 1015.
- on non-resident, how made, 1015.
- service by telegraph, 1017.

In actions.

- of abstract, provided in partition, 799.
- of application for injunction, when required, 823.
- of injunction, to be given to corporation, 531.
- of motion to vacate injunction, 532.
- of *lis pendens*, to be filed in real actions, 409.
- to be served on lien-holders in partition, 762.
- to tenant, on unlawful detainer, 1161.
- to tenant, at will or by sufferance, 1161.
- of motion, for survey of lands, 742.
- of security, for costs required of non-residents, 1037.
- of arrest of defendant in Justices' Courts, 864.
- of change of attorney, in actions, 235.
- to produce written instrument in evidence, 1938.
- of filing award, 1286.
- on return of jury for instructions, 614.
- of sale under execution, how given, 692.
- of claim to contribution, on execution, 709.
- of motion for new trial, to be filed and served, 659.
- of appeal, what to state, and when to be served, 940.
- of appeal, in Justices' and Police Courts, 974.

In special proceedings.

- of application for mandate, 1088.
- of application for writ of review, 1069.
- of application for discharge from imprisonment, 1144.
- of application for discharge, how served, 1145.
- of hearing petition for probate, 1303.
- of probate of foreign will, 1323.
- of application for letters of administration, 1373.
- to creditors, to present claims, 1490.
- of application as sole trader, 1812.
- of taking deposition out of State, 2024.
- of taking deposition in State, 2031.

Nuisance—defined, actions for, 731.

jurisdiction, in actions for, 76.

Numerals—may be used, 186.**Nuncupative wills—proceedings in probate of, 1344-1346.**

See **WILLS**.

Oath—includes affirmation and declaration, 2097.

- may be administered by courts of justice, 128.
- may be administered by judicial officers, 177.
- by court commissioners, 259.
- judicial and other officers, 2093.
- arbitrators may administer, 1284.
- in general, who may administer, 2093.
- how administered, 2094.
- of attorney and counsellor, 278.
- of jury, form of, 604.
- of executors and administrators, 1387.
- of prisoner, confined on civil process, form of, 1148.
- of official reporter, 272.
- how administered, 2094.

Oath—Continued.

form may be varied, how, 2095.
 form of, in discretion of court, 2096.
 affirmation, equivalent to, 2097.

Objections—in practice, when taken by demurrer or answer, 433.
 when not taken, deemed waived, 434.
 to appointment of referee, how tried, 642.
 to granting letters of administration, when filed, 1351.
 may be taken to dissolution of corporation, 1231.

Obligation—defined, 26.

Occupant—of real property, in forcible entry and detainer, 1160.
 See LIMITATION OF ACTIONS.

Offer to compromise—proceedings on, 997.
 is not an admission that anything is due, 2078.
 in Justices' Courts, 895.

Office—eligibility for office of superior judge, 157.
 justices and judges ineligible for other offices, 161.
 actions for usurpation of, 803-810.
 tenure of, preserved, 6.
 See USURPATION OF OFFICE.

Officers—of Court of Impeachment, 38.
 ministerial, elections and terms, 262.
 actions for usurpation by, 803.
 ministerial, elections, etc., where provided, 262.
 judicial, incidental powers of, 176-179.

Official documents—how proved, 1918.
 See PUBLIC RECORDS.

Olographic will—how proved, 1309.

Opinion—of Supreme Court, to be in writing, 49.

Oral examination—defined, 2005.
 See EXAMINATION OF WITNESSES.

Order—definition, 1003.
 definition, in special proceedings, 1064.
 where made, 1004.
 transfer of, to show cause, 1006.
 may be enforced, 177.
 for payment of money, how enforced, 1007.
 second application for, refused, 182.
 how reviewed, 936.
 made out of court, may be vacated, 937.
 duty of supreme clerk, on appeal from, 956.
 in Superior Courts, what appealable, 963.
 may be served by telegraph, 1017.
 for new trial, in Supreme Court, costs on, 1027.
 copy of, to be filed in eminent domain, 1253.
 copy of, to form part of judgment roll, 670.
 judicial, effect of, 1909.

In actions.

relief from inadvertence or mistake, 473.
 relief from neglect or surprise, 473.
 to show cause in injunction, 630.
 for investment of funds in hands of receiver, 569.
 for sale of property attached, 548.
 to deposit money in hands of trustees, 572.
 to deposit money in treasury, 573.
 enforcement of order of deposit, 574.
 discharging sick juror, 615.
 granting or refusing new trial, deemed excepted to, 647.

Order—Continued.*In actions.*

- disobedience of, in supplementary proceedings, 721.
- for survey of lands in real actions, 742.
- for survey, what to contain, 743.
- of sale in foreclosure, 728.
- granting or refusing new trial, appealable, 939.
- dissolving attachment, effect of appeal from, 946.
- of Superior Court, for transmission of appeal papers, 977.
- for inspection of documents, 1000.
- dismissing action for want of new security, 1037.

In special proceedings.

- requiring debtor to appear and answer, 714.
- for examination of debtor of debtor, 717.
- for application of property of such a one, 719.
- for trial of issue in mandate, what to state, 1090.
- of discharge of person imprisoned on civil process, 1149.
- committing for contempt, 1222.
- on application for dissolution of corporation, 1230
- final, for condemnation of land, when made, 1253.
- in relation to escheated estates, 1269.
- changing name of person, 1278.
- on submission to arbitration, 1283.
- of new hearing by arbitrators, 1287.
- to custodian to produce will, 1302.
- to show cause why probate should not be revoked, 1328.
- of right to administration, precedence, 1365.
- for probate sales, 1516-1576.

See MOTIONS.

Order of arrest—how obtained, 481.

what required to obtain, 482.

in Justices' Court, when made, 861.

See ARREST AND BAIL.

Order of proceedings—on trial of action, 607.

powers and duties of courts, 128.

courts may make rules, 129.

powers of judges at chambers, 165, 166.

Original evidence—defined, 1829.

Original jurisdiction—of Supreme Court, 51.

of Superior Court, 76.

Papers—filing and service of, 1010-1017.

lost papers, how supplied, 1045.

what papers valid, 1046.

to be furnished by *attorneys*, 1047.

copies of, to be *made*, 1048.

what may be *taken*, 1049.

See NOTICES.

Partial evidence

Partiality—of *judge*

Particulars—of *pleading*

Parties—designating

demurrer

action to

assign

execu

execu

mar

hus

wh

Parties—Continued.

- infant to appear by guardian, 372, 1722.
 guardian *ad litem*, how appointed, 373.
 unmarried female may sue for her own seduction, 374.
 father, etc., may sue for seduction of daughter, 375.
 father, etc., may sue for injury or death of child, 376.
 representatives may sue for death caused by negligence, 377.
 who may be joined as plaintiffs, 378.
 who may be joined as defendants, 379.
 landlord, 379.
 parties in interest, when to be joined, 380.
 when one or more may sue or defend for all, 382.
 holding title under common source, when may join, 381.
 common interest, one may sue for all, 382.
 all may be joined, 382.
 plaintiff may sue in one action different parties to commercial
 paper, 383.
 tenants in common may sever an action, 384.
 death, or other disability, not abate action, 385.
 proceedings on disability of, 385.
 another person may be substituted defendant, 386.
 intervention, when takes place, and how, 387.
 associates may be sued by name of association, 388.
 court, when to decide controversy, or to order parties in, 389.
 adding or striking out, 473.
 names of, in complaint, 426.
 names of, in summons, 407.
 defendant may be sued by any name, when, 474.
 who may appeal, parties, how designated, 938.
 administrator, when may sue alone, 1586.
 identity of, when deemed, 1910.

In actions and special proceedings.

- actions to redeem, 346.
 ejectment, 380, 381.
 forcible entry, 1164.
 mechanics' liens, 1196.
 for foreclosure, 736.
 for nuisance, 731.
 who liable for waste, 732.
 when may enter on land to survey, 742.
 plaintiffs in action for partition, 752.
 defendants in action for partition, 754.
 order in, 751.
 803.
 ed, 1063.
 her, 1164.
 6.
 53.
 parties, 754.
 796.
 publication, 757.
 in, 758.
 ed in one action, 759.
 or referee be appointed, 761.
 year, 762.

Order—Continued.*In actions.*

- disobedience of, in supplementary proceedings, 721.
- for survey of lands in real actions, 742.
- for survey, what to contain, 743.
- of sale in foreclosure, 728.
- granting or refusing new trial, appealable, 939.
- dissolving attachment, effect of appeal from, 946.
- of Superior Court, for transmission of appeal papers, 977.
- for inspection of documents, 1000.
- dismissing action for want of new security, 1037.

In special proceedings.

- requiring debtor to appear and answer, 714.
- for examination of debtor of debtor, 717.
- for application of property of such a one, 719.
- for trial of issue in mandate, what to state, 1090.
- of discharge of person imprisoned on civil process, 1149.
- committing for contempt, 1222.
- on application for dissolution of corporation, 1230
- final, for condemnation of land, when made, 1253.
- in relation to escheated estates, 1269.
- changing name of person, 1278.
- on submission to arbitration, 1283.
- of new hearing by arbitrators, 1287.
- to custodian to produce will, 1302.
- to show cause why probate should not be revoked, 1328.
- of right to administration, precedence, 1365.
- for probate sales, 1516-1576.

See MOTIONS.

Order of arrest—how obtained, 481.

- what required to obtain, 482.
- in Justices' Court, when made, 861.

See ARREST AND BAIL.

Order of proceedings—on trial of action, 607.

- powers and duties of courts, 128.
- courts may make rules, 129.
- powers of judges at chambers, 165, 166.

Original evidence—defined, 1829.**Original jurisdiction—of Supreme Court, 51.**

- of Superior Court, 76.

Papers—filing and service of, 1010-1017.

- lost papers, how supplied, 1045.
- what papers valid, 1046.
- to be furnished by appellant, on appeal, 950.
- copies of, to be certified, 953.
- what may be taken by jury, on retiring, 612.

See NOTICE.

Partial evidence—defined, 1834.**Partiality—of judge, ground for change of venue, 397.****Particulars—obtaining bill of, 454.****Parties—designation of, 308.**

- demurrer for misjoinder, 430.
- action to be in name of party in interest, 367.
- assignment not to prejudice defense, 368.
- executor, trustee, etc., may sue without joining beneficiary, 369.
- executors, who to be joined, 1587.
- married woman, actions by and against, 370.
- husband and wife, joinder of, 370, 371.
- when wife may defend, 371.

Parties—Continued.

- infant to appear by guardian, 372, 1722.
- guardian *ad litem*, how appointed, 373.
- unmarried female may sue for her own seduction, 374.
- father, etc., may sue for seduction of daughter, 375.
- father, etc., may sue for injury or death of child, 376.
- representatives may sue for death caused by negligence, 377.
- who may be joined as plaintiffs, 378.
- who may be joined as defendants, 379.
- landlord, 379.
- parties in interest, when to be joined, 380.
- when one or more may sue or defend for all, 382.
- holding title under common source, when may join, 381.
- common interest, one may sue for all, 382.
- all may be joined, 382.
- plaintiff may sue in one action different parties to commercial paper, 383.
- tenants in common may sever an action, 384.
- death, or other disability, not abate action, 385.
- proceedings on disability of, 385.
- another person may be substituted defendant, 386.
- intervention, when takes place, and how, 387.
- associates may be sued by name of association, 388.
- court, when to decide controversy, or to order parties in, 389.
- adding or striking out, 473.
- names of, in complaint, 426.
- names of, in summons, 407.
- defendant may be sued by any name, when, 474.
- who may appeal, parties, how designated, 938.
- administrator, when may sue alone, 1586.
- identity of, when deemed, 1910.

In actions and special proceedings.

- actions to redeem, 346.
- ejectment, 380, 381.
- forcible entry, 1164.
- mechanics' liens, 1196.
- for foreclosure, 726.
- for nuisance, 731.
- who liable for waste, 732.
- when may enter on land to survey, 742.
- plaintiffs in action for partition, 752.
- defendants in action for partition, 754.
- court may order in, in partition, 761.
- for usurpation of office or franchise, 803.
- in special proceedings, how designated, 1063.
- defendants in forcible entry and detainer, 1164.
- who joined in suits for liens, 1196.
- defendant in condemnation of land, 1246.
- who may submit to arbitration, 1281.
- who are estopped, 1908-1910.

Partition—who may bring action for, 752.

- interests of all parties to be set forth, 753.
- lien-holders not of record, need not be parties, 754.
- recording of *lis pendens* in cases of, 755.
- summons, to whom must be directed, 756.
- unknown parties may be served by publication, 757.
- answer of defendants, what to contain, 758.
- rights of all parties may be ascertained in one action, 759.
- partial partition may be made, 760.
- lien-holders must be made parties, or referee be appointed, 761.
- lien-holders must be notified to appear, 762.
- order for, and referees, 763.
- when town-site included, 763.

Partition—Continued.

- intervention of parties, 337.
- must be made according to rights of parties, 764.
- referees to report proceedings, 765.
- action of court on report, judgment thereon conclusive, 766.
- judgment in, how enforced, 636.
- judgment not to affect tenant for years, 767.
- expenses of partition to be apportioned, 768.
- lien on undivided interest, a charge on what, 769.
- estate for life or years, how may be set off in, 770.
- application of proceeds of sale of encumbered property, 771.
- party holding other securities, required to first exhaust them, 772.
- deduction from proceeds, 773.
- cause may be continued for determination of claims, 774.
- sales by referees, to be at public auction, 775.
- court must direct terms of sale, 776.
- referees may take security for purchase-money, 777.
- tenants, whose estates are sold, to receive compensation, 778.
- court may fix compensation, 779.
- court must protect unknown tenants, 780.
- court must ascertain value of, and secure future contingent interests, 781.
- terms of sale to be made known at time, 782.
- lots must be separately sold, 782.
- who may not be purchasers, 783.
- referees must make report of sales, 784.
- conveyance may be executed on confirmation, 785.
- proceedings, if lien-holder becomes purchaser, 786.
- conveyance, must be recorded, 787.
- conveyance, a bar against parties, 787.
- proceeds belonging to unknown parties must be invested, 788.
- investment to be made in name of clerk, 789.
- securities to be taken for interests of parties, when ascertained, 790.
- duties of clerk making investments, 791.
- on unequal partition, compensation may be adjudged, 792.
- share of infant may be paid to guardian, 793, 1772.
- share of insane person may be paid to guardian, 794.
- guardian may consent to partition without action, and execute releases, 795, 1772.
- costs of partition, a lien on share, 796.
- court, by consent, may appoint single referee, 797.
- expenses of previous litigation allowed, 798.
- abstract of title, when furnished, 799.
- abstract, how made and verified, 800.
- interest on disbursements, in discretion, 801.

Partner—administratrix cannot be, 1365.

- sued by firm name, 338.
- rights in estate of deceased, 1585.

Payment of debts of decedent—when will provides for, it must govern, 1560.

- if provision insufficient, proceedings thereon, 1562.
- estate subject to debts, 1563.

See **ESTATES OF DECEASED PERSONS, EXECUTORS, AND ADMINISTRATORS.**

Penalty—for failure to deliver will, 1298.

- attachment for refusal to produce will, 1302.
- for practicing as attorney without license, 281.
- for disobedience of mandate, 1097.

See **FINES, CONTEMPTS.**

Pendency of action—when action deemed pending, 1049.

- notice of, to be filed in real actions, 409.
- as a ground for demurrer to subsequent suit, 430.

- People**—execution to be in name of, 681.
do not give security, 529.
State, or State officer, does not give security, 1058.
- Performance**—of conditions precedent, how averred, 457.
time of, of act, may be extended, 1054.
- Perpetuating testimony**—mode of, 2083.
deposition, when may be produced, 2088.
effect of deposition, 2089.
- Person**—defined, what it includes, 17.
- Personal injury**—who may sue for, 374-377.
- Personal property**—defined, 17.
how attached, 542.
when may be sold under attachment, 550.
order for sale of, 548.
trial of claim of third person to, 549.
- Pestilence**—ground for removal of court, 142.
- Petit larceny**—jurisdiction in Justices' Courts, 115.
- Petition**—for change of name, what must specify, 1276.
must be published four weeks, 1277.
for sole trader, what to contain, 1813.
petitions in probate proceedings, 1371, 1397.
petitions for sales of property in probate, 1518, 1530, 1537.
See WILLS, PROBATE OF WILLS, EXECUTORS, AND ADMINISTRATORS.
- Phonographic reporter**—appointment and duties, 269.
how appointed, 269.
effect of report of, 270.
compensation of, 271.
personal attendance required, 273.
transcript of notes *prima facie* evidence, 270.
when clerk to take down testimony, 1051.
oath of, 274.
qualifications, testing, 272.
- Physician**—not subject to jury duty, 200.
what property of, exempt from execution, 690.
when disqualified as a witness, 1881.
when must testify, 1832.
- Place of holding courts**—when may be changed, 142.
appearance at place appointed, compulsory, 143.
when judge may order rooms, etc., 144.
- Place of trial**—to be tried where subject-matter situated, 393.
other actions where cause thereof arose, 393.
when local, 392-393.
of actions against counties, 394.
other actions according to residence of parties, 395.
in any county, unless defendant demands in proper county, 396.
exceptions, when deemed taken, 647.
may be changed in certain cases, 397.
when judge disqualified, cause to be transferred, 398.
proceedings in probate, where to be transferred, 1431.
papers to be transmitted, costs, jurisdiction, etc., 399.
proceedings after judgment in cases transferred, 400.
transfer of probate proceedings not to change right to administer, 1432.
retransfer, how made, 1432.
when proceedings to be returned to original court, 1433.

Pleadings—defined, 420.

- are part of judgment roll, 670.
- forms and rules of, prescribed, 421.
- forms and rules in Justices' Courts, 851-860.
- in proceedings against joint debtors, 993.
- in Police Courts, 931.
- what pleadings are allowed, 422.
- complaint, the first pleading on action, 425.
- what complaint to contain, 426.
- what causes may be joined in, 427.
- when defendant may demur, 430.
- what demurrer must specify, 431.
- defendant may demur to part of complaint, 431.
- may demur and answer at same time, 431.
- proceedings to be had on amendment of complaint, 432.
- objections not appearing may be taken by answer, 433.
- objections to complaint, when deemed waived, 434.
- answer, what to contain, 437.
- counter-claim, when set up in, 438.
- counter-claims, omission to set up, 439.
- cross demands, deemed compensated, 440.
- answer may contain several defenses, 441.
- cross-complaint, 442.
- when plaintiff may demur, 443.
- grounds of plaintiff's demurrer, 444.
- verification of pleadings, 446-449.
- execution of instrument, when not deemed admitted, 449.

General rules of pleading.

- pleadings to be liberally construed, 452.
- sham and irrelevant answers, etc., may be stricken out, 453.
- account, how stated in, 454.
- description of real property in, 455.
- judgments, how pleaded, 456.
- conditions precedent, how to be pleaded, 457.
- Statute of Limitations, how pleaded, 458.
- private statutes, how pleaded, 459.
- libel and slander, how stated in complaint, 460.
- special damage in libel need not be alleged, 460.
- answer in cases of libel and slander, 461.
- allegation not denied, when deemed true, 462.
- allegation, when deemed controverted, 462.
- material allegation, defined, 463.
- supplemental complaint and answer, 464.
- pleadings subsequent to complaint to be filed and served, 465.

Amendments.

- material variance, how provided for, 469.
- immaterial, how, 470.
- what not a variance, 471.
- amendments of course, 472.
- by the court, enlarging time, etc., 473.
- suing by fictitious name, 474.
- errors and defects, when disregarded, 475.
- forms of, in Justices' Courts, 851-860.
- forms of, in Police Courts, 961.
- when heading defective, 1046.
- lost, how supplied, 1045.

Plural—includes singular, 17.**Police Courts**—actions in, 929-933.

- appeals from may be taken, 77.
- establishment of, 121.
- to have seal, 147.
- jurors, how summoned in, 250.
- manner of impanelling, 251.

Police Courts—Continued.*Proceedings in civil actions in.*

- how commenced, 929.
- pleadings in, 930-931.
- summons must issue, when, 930.
- defendant may plead orally or in writing, 931.
- trial by jury, when defendant entitled to, 932.
- proceedings to be conducted as in Justices' Courts, 933.
- appeals from judgments of, 974.

Police judge—may take acknowledgments and affidavits, 179.

See JUDICIAL OFFICERS.

Possession of land—when presumed, 323.

- occupation deemed, under legal title, 323.
- occupation, when deemed adverse, 324.
- what adverse possession under written instrument, 325.
- actual occupation under claim of title deemed adverse, 324.
- adverse possession under unwritten claim of title, 325.
- possession of tenant, when deemed possession of landlord, 326.
- limitation of adverse possession of tenant, 327.
- right of, not affected by descent cast, 328.
- certain disabilities excluded from time to commence actions, 323.

Postponement—of civil trial, 595.

See CONTINUANCE.

Powers—of Supreme Court justices at chambers, 165.

of judges of Superior Courts, 166.

Powers of court—amendments, 128.

- to administer oaths, 128.
- to compel obedience, 128.
- to control officers and process, 128.
- to enforce orders and coerce witness, 128.
- on contempt, 1269-1272.

Present tense—includes the future but excludes the past, 17.**Presumptions—defined, 1959.**

- when may be controverted, 1961.
- conclusive, specified, 1962.
- controvertible, specified, 1963.

Priest—when may be excused from testifying, 1881.

when must testify, 1882.

Primary evidence—defined, 1829, 1833.

- as to third parties, 1851.
- entries on public records are, 1920.
- entries in justice's docket are, 912.
- books, maps, and charts, when, 1936.
- certificate of purchase or location of lands is, 1925.
- entry made by officer, or board of officers, when, 1926.
- handwriting and entries of deceased, 1946.

Printing—included in writing, 17.**Private property—what may be taken for public use, 1240-1241.**

See CONDEMNATION OF LAND.

Private sittings—of court in certain cases, 125.**Private statute—defined, 1898.**

- how pleaded, 459.
- foreign law-books admissible in evidence, 1900.
- recitals in, how far evidence, 1903.

Private writings—classification of, 1929.

- distinction between sealed and unsealed, abolished, 1932.
- execution of instrument defined, 1933.

Private writings—Continued.

- compromise of debt without seal, good, 1934.
- subscribing witness defined, 1935.
- books, maps, etc., how far evidence, 1936.
- original writing to be produced or accounted for, 1937.
- notice to be given to produce, 1938.
- writings called for and inspected may be withheld, 1939.
- execution of, how proved, 1940.
- when other than subscribing witness may testify, 1941.
- when evidence of execution not necessary, 1942.
- evidence of handwriting, to prove, 1943.
- of handwriting allowed by comparison, 1944.
- comparisons with, what may be made, 1945.
- entries of decedents as evidence, 1946.
- copies of entries, 1947.
- how acknowledged and certified, 1948.
- public records not to be carried about, 1950.
- what may be read in evidence, 1951.
- public records of, how proved, 1919.

Privileged communications—1881.**Probate proceedings—***Jurisdiction and proceedings in general.*

- in Superior Court, 76.
- when exercised over estates, 1294.
- when decided by first application, 1295.
- court may determine all questions as to advancements, 1686.
- orders and decrees to be entered in minutes, 1704.
- how often publication to be made, 1705.
- recorded decree or order to impart notice, 1706.
- citation, how directed, and what to contain, 1707.
- when issued without order of judge, 1708.
- citation, how served, 1709.
- citation, when a substitute for personal notice, 1710.
- to be served five days before return, 1711.
- published description of real estate, 1712.
- practice and proceedings in, 1713.
- new trials and appeals in, 1714.
- appeal to be taken within sixty days, 1715.
- from what proceedings an appeal lies, 969.
- effect of judgment in, 1906.
- issues joined in, how tried and disposed of, 1716.
- court to try cause when no jury demanded, 1717.
- new trial, how and when moved for, 1717.
- court to appoint attorney for minor or absent heirs, etc., when, 1718.
- compensation for attorney of absentee, 1718.
- decree relating to homestead and effect thereof, 1719.
- costs, by whom paid in certain cases, 1720.
- court may remove executor, etc., for contempt, 1721.
- service of process on guardian, 1722.
- court may order investment of moneys of estate, 1792.
- Disqualification of judge and transfer of administration.*
- when judge not to act, 1430.
- judge being disqualified, proceedings to be transferred, where, 1431.
- transfer not to change right to administer, 1432.
- retransfer, how made, 1432.
- when proceedings to be returned to original court, 1433.
- power of, at chambers, 167, 1306.
- may hold court in other county, 161.
- Production and proof of wills.*
- custodian of will to deliver same, to whom, 1392

Probate proceedings—Continued.***Production and proof of wills.***

- penalty for neglect to do so, 1296.
- who may petition for probate of will, 1299.
- contents of petition, 1300.
- when executor forfeits rights to letters, 1301.
- will to accompany petition, 1302.
- presentation of wills to be prayed for and enforced, 1302.
- notice of petition, how given, 1303.
- heirs and named executors, to be notified, 1304.
- petition may be presented in chambers, 1305.
- hearing and proof of will, when, 1306.
- who may appear and contest, 1307.
- probate, when no contest, 1308.
- olographic wills, probate of, 1309.
- wills, proved in other States, to be recorded, 1322.
- proceedings on production of foreign will, 1323.
- hearing proofs of probate of foreign will, 1324.
- proof of lost or destroyed will, 1333.
- must have been in existence at time of death, 1339.
- to be certified, recorded, and letters granted, 1340.
- court to restrain injurious acts of, pending proceedings, 1341.
- probate of nuncupative wills, how, 1344.
- additional requirements, 1345.
- probate of will to bear seal of court, 153.
- evidence required to prove will, 1963.
- evidence required to prove will revoked, 1970.

Contesting probate.

- contestant to file, grounds of contest, 1312.
- how jury obtained, and trial had, 1313.
- verdict—judgment—appeal, 1314.
- witness, who, and how may, 1315.
- proof of handwriting, 1315.
- testimony reduced to writing, 1316.
- if proved, certificate to be attached, 1317.
- will and proof to be filed and recorded, 1318.
- contests of nuncupative wills, 1346.

Contesting will after probate.

- to be within a year, 1327.
- citation to be issued, 1328.
- hearing on proof of service, 1329.
- petitions tried by jury or court, 1330.
- judgment, what, 1330.
- on revocation, powers of executors cease, 1331.
- costs and expenses, by whom paid, 1332.
- probate, when conclusive, 1333.
- time given to infants and others, 1333.

Proceedings—conduct of, power of judicial officers over, 177.

- to be in English language, 185.
 - powers of court over conduct of, 128.
 - courts of record may make rules to regulate, 129
 - when rules take effect, 130.
 - on non-attendance of judge at court, 139.
 - not affected by vacancy in office, 184.
 - to be in the English language, 185.
 - abbreviations used in, 186.
 - numbers may be expressed by figures, 186.
 - in case juror becomes sick, 615.
 - what treatment of, is a contempt, 1209.
- See SPECIAL PROCEEDINGS.

Process—defined, 17.

- of Superior Courts, 78.
- CODE CIV. PROC.—63.**

Process—Continued.

- to be in English language, 185.
- abbreviations used in, 183.
- means to carry out jurisdiction, 187.
- relief from inadvertence or mistake, 473.
- in Justices' Courts may issue to any part of county, 106.
- may issue from court at chambers, 163, 166.
- blanks in must be filled by justice of peace, 920.
- what treatment of is a contempt, 1209.

Professional implements—exempt from execution, 690.**Prohibition—writ of, defined, 1102.**

- Supreme Court may issue, 51.
- Superior Courts may issue, 76.
- writ of, the counterpart of mandate, 1102.
- where and when issued, 1103.
- form of, may be alternative or peremptory, 1104.
- provisions respecting issuance of, 1105.
- when returnable and heard, 1106.
- rules of practice, 1109.
- appeals and new trials, 1110.

Proof—defined, 1824.

- of service of summons, how made, 415.

Property—term defined, 17.**Public administrators—rank of, in order of persons entitled to administer, 1865.**

- estates which may be administered by, 1726.
- to obtain letters, when and how—bond and oath of, 1727.
- duty of person in whose house stranger dies, 1738.
- must return inventory and administer estates, 1729.
- when to deliver up estate, 1730.
- civil officers to give notice of waste, 1731.
- suits for property of decedents, 1732.
- order to examine party charged with embezzling estate, 1733.
- punishment for disobedience of order, 1734.
- order on, to account, 1735.
- every six months to return condition of estate, 1736.
- duty as to estate, moneys, escheats, etc., 1737.
- not to be interested in payment on account of estate, 1733.
- when to settle with county clerk, 1739.
- how unclaimed estates disposed of, 1739.
- proceedings against, for failure to pay over moneys, 1740.
- fees of officers, when and by whom paid, 1741.
- to administer oaths, 1742.
- probate, proceedings applicable to, 1743.

See ESTATES OF DECEASED PERSONS, EXECUTORS AND ADMINISTRATORS, SPECIAL ADMINISTRATORS.

Publication—see ESTATES OF DECEASED PERSONS, SOLE TRADER, SUMMONS, NOTICE, WILLS.**Public buildings—what exempt from execution, 690.**

- right of eminent domain, exercised in behalf of, 1238.

Public calamity—ground for removal of court, 142.**Public offenses—cognizable in Justices' Courts, 115.****Public officer—place of trial, in actions against, 393.**

- may be arrested, for embezzlement, 479.
- when excused from giving testimony, 1881.
- when must testify, 1882.
- penalty for disobedience of writ, 1097.
- must give copy of public writing on demand, 1898.

Public records—judicial record defined, 1904.
 how authenticated, 1905.
 record of foreign country, how authenticated, 1906.
 oral evidence of a foreign record, 1907.
 effect of, judgment upon rights, 1908.
 effect of other judicial orders, 1909.
 where parties to, are deemed to be the same, 1910.
 what deemed adjudged in a judgment, 1911.
 sureties bound by, 1912.
 of foreign state, effect of, 1913.
 of court of admiralty, 1914.
 effect of foreign judgment, 1915.
 manner of impeaching, 1916.
 the jurisdiction necessary on a judgment, 1917.
 of private writings as evidence, 1919.
 entries in official books, primary evidence, 1920, 1926.
 justices' judgment in other States, how proved, 1921, 1922.
 copy of, to bear seal of court, 193.
 provisions as to States to apply to Territories, 1924.
 See EVIDENCE, PUBLIC WRITINGS.

Public uses—see CONDEMNATION OF LAND.

Public writing—defined, 1888.
 rights of citizens to inspect, 1892.
 public officers, bound to give copies, 1893.
 four kinds of public writings, 1894.
 laws written, or unwritten, 1895.
 written laws, defined, 1896.
 Constitution and statutes, 1897.
 public and private statutes, defined, 1898.
 unwritten laws, defined, 1899.
 books containing same, presumed correct, 1900.
 public seal, authenticates law or document, 1901.
 other evidence of, laws of other States, 1902.
 recitals in statute, how far evidence, 1903.
 judicial record, defined, 1904.
 record, how authenticated, as evidence, 1905.
 record of foreign country, how authenticated, 1906.
 oral evidence of foreign record, 1907.
 effect of judgment upon rights in various cases, 1908.
 effect of other judicial orders, when conclusive, 1909.
 where parties are deemed to be the same, 1910.
 what deemed adjudged in a judgment, 1911.
 where sureties bound, principal is also, 1912.
 manner of proving official documents, 1918.
 official certificate, contents of, 1923.
 provisions as to States, to apply to Territories, 1924.
 certificate of purchase, primary evidence of ownership, 1925.
 entries made by officers or boards, primary evidence, 1926.
 See PUBLIC RECORDS.

Qualifications—of justices of Supreme Court, 156.
 of judges of Superior Courts, 157.
 of sureties, 1056.

Questions—of law are addressed to the court, 2102.
 of fact, are addressed to the jury, 2101.
 provisions applicable, referee or other officer, 2103.

Quieting title—who may be joined as defendants in actions, 379.
 injunction, 526.
 parties in action, 733.
 when plaintiff cannot recover costs, 739.
 termination of plaintiff's title, verdict and judgment on, 740.

Quieting title—Continued.

- value of improvements, when allowed as set-off, 741.
- order may be allowed for survey of land, 742.
- order, what to contain, and how served, 743.
- unnecessary injury, liability for, 743.
- mortgage not deemed a conveyance, 744.
- money, etc., generally, 1050.
- parties to action, 372, 379-381, 738.
- alienation, pending suit, 747.

Quo warranto—writ abolished, 802.**Real property—means lands, tenements, and hereditaments, 17.**

- limitation, of actions for, 315-328.
- place of trial, in actions for, 302.
- entry upon and possession of, 320-324.
- intervention in actions for, how effected, 387
- recovery of, claims for, may be united, 427.
- description of, in pleadings, 455.
- how attached, 542.
- execution against, what to recite, 682.
- return of execution against, how made, 683.
- judgments against, how enforced, 684.
- execution on, how and to whom issued, 687.
- how seized on execution, 688.
- foreclosure, 726.
- partition, 752-801.
- sale of, in partition, 763.
- sale of, in foreclosure, when to cease, 723.

See REDEMPTION.

Receivers—appointment of, and duties generally, 304, 564.

- upon dissolution of corporation, 565.
- person interested cannot be, 566.
- attorney shall not be appointed, 566.
- oath and undertaking of, 567.
- powers of, 568.
- investments of funds by, 569.
- appointment of, in escheated estates, 1270.
- in foreclosure suits, 564.

Record—copy of, to bear seal of court, 153.

- transcript of, evidence of executor's authority, 1429.
- removal, only by order, 1950.

See PUBLIC RECORDS.

Recovery of property—claims for, may be united, 427.**Redeem—limitations as to suit to, 346, 347.****Redemption—who are redemptioners, 701.**

- when property may be redeemed from execution sale, 702.
- when judgment debtor or other redemptioner may redeem, 703.
- notice of redemption, 703.
- to whom payments to be made, 704.
- kind of money to be paid, 704.
- what redemptioner must do, 705.
- court may restrain waste pending time for redemption, 706.
- rents and profits, 707.
- limitation of action to redeem, 346.
- of action to redeem part of mortgaged premises, 347.

Reference and referees—on trial of charge against attorney, 298.

- may be ordered for taking account, 636.
- when may be ordered on agreement of parties, 638.
- ordered on motion, in what cases, 639.

- Reference and referees—Continued.**
 number of referees—qualifications, etc., 640.
 either party may object, 641.
 grounds of objection, 641.
 objections, how disposed of, 642.
 referees to report within ten days, 643.
 finding of referees, effect of, 644.
 exceptions to findings of, 259.
 exception to, and review of findings, 645.
 referees may be appointed in partition, 761, 763.
 trial before, in partition, 762.
 referees to divide property, rules to govern, 764.
 must report their proceedings, 765.
 report may be set aside or affirmed, 766.
 expenses of referees in partition, 768.
 may take security for purchase-money in partition, 777.
 cannot be purchasers in action, 783.
 must report sale of property, 784.
 all must meet, but two may act, 1053.
- Register of actions**—clerk to keep, 1052.
- Rehearing**—in Supreme Court, 43.
- Relief**—what granted in judgment, 580.
- Remedies**—judicial, defined, 20.
 how divided, 21.
 nor merged, 32.
 See ACTIONS, CIVIL ACTIONS.
- Remittitur**—of judgment of Supreme Court, 56.
 duty of clerk, 958.
- Removal**—of action. See TRANSFER.
- Rents and profits**—pending redemption, 707.
- Replevin**—See CLAIM AND DELIVERY.
- Reporters, official**—appointment of, 269.
 qualifications of, 270.
 attention to duties, 271.
 oath of, 272.
 reports *prima facie* correct, 273.
 fees of, 274.
- Residences**—of superior judges, 158.
 of justices of the peace, 159.
- Return**—of execution, when to be made, 683.
 of gold dust, how made, 688.
 of summons, 415.
 See EXECUTION, SUMMONS.
- Revocation**—of probate of will, 1327–1333. See WILLS.
- Review, writ of**—jurisdiction of Supreme Court, 52.
 may be issued by Supreme Court at chambers, 165.
 may issue and be heard at chambers, 165, 166, 1108.
 writ of, defined, 1067.
 when and by what courts granted, 1068.
 application for, how made, 1069.
 how to be directed, 1070.
 contents of writ, 1071.
 proceedings in inferior court may be stayed or not, 1072.
 service of writ, 1073.
 extent of review under writ, 1074.
 defective return may be perfected, 1075.
 hearing and judgment on, 1075.

Review, writ of—Continued.

- copy of judgment to be sent to inferior tribunal, 1076.
- judgment roll, 1077.
- when may issue, and be heard, 1103.
- rules of practice, 1109.
- new trials and appeals, 1110.
- costs in actions on, 1032.

Rights and remedies—when not merged, 32.

- Code not to affect, 8.

Rules—of court of record, 129.

- when to take effect, 130.
- of Justices' Courts in cities and counties, 96.
- See PROCEEDINGS, COURTS OF JUSTICE.

Sales of property of decedents—see ESTATES OF DECEASED PERSONS, EXECUTORS AND ADMINISTRATORS.**Sale of real property—in foreclosure, when to cease, 723.**

- may be ordered in partition, 763.
- proceeds of, how applied, 771.
- sales of, by referees, must be at auction, 775.
- terms of, must be directed by court, 776.
- terms of, to be made known at time, 782.
- who may not purchase at, 783.
- conveyance, when to be executed, 785.
- conveyance, effect of recording, 787.
- See EXECUTION.

Satisfaction of judgment—by whom may be acknowledged, 179.

- how entered, 283, 675.

Satisfactory evidence—defined, 1835.**Scire facias—abolished, 802.****Seal—defined, 14, 1930.**

- what courts to have, 147.
- of Supreme Court, 148.
- of Superior Courts, 149.
- of Police Courts of cities and counties, 150.
- how provided, 151.
- of court commissioner, 259.
- to be kept by clerk, 152.
- to what proceedings to be affixed, 153.
- to be affixed to execution, 632.
- certain writs and process valid without, 158.
- how telegraphed, 1017.
- private seal, how may be made, 1931.
- public, how made, 1931.
- of what seals courts take judicial notice, 1875.
- public seal authenticates law or document, 1901.
- record, how authenticated, 1905.
- authentication of justices' record or docket, 1922.
- to be affixed to official certificate, 1923.
- private, scroll may be used for, 1931.
- effect of, on private writings, 1932.

Secondary evidence—defined, 1830.**Secretaries of Supreme Court—appointment of, 265.**

- terms and salaries of, 266.

Secular acts—not to be done on holidays, 13.**Seduction—who may prosecute actions for, 374, 375.**

- private sittings of court, 125.

- Service**—of summons, how made, 411.
 publication, when allowed, 412.
 manner of publication, 413.
 how made on joint defendants, 414.
 proof of, how made, 415.
 appearance, equivalent to, 416.
 on association, 388.
 of complaint and affidavit in injunction, 527.
 publication, when allowed, 412.
 notice and papers, how served, 1011.
 service of, by mail, when, 1012.
 deposit in post-office, 1013.
 time for appearance, when regulated by distance, 1013.
 upon whom made, after appearance, 1014.
 how made on non-resident, 1015.
 may be made by telegraph, 1017.
 of writ of mandate and prohibition, how made, 1096.
 of writ of review, how made, 1073.
- Sessions**—of Supreme Court, 47.
 of Superior Courts, 73.
- Shares**—in homestead association exempt from execution, 690.
- Shares and interests**—how seized on execution, 688.
 in corporation, subject to attachment, 541.
 how attached, 542.
- Sheriff**—*ex officio* officer of Justices' Courts, 87.
 to summon jurors, 225.
 summoning to complete panel, 227.
 action against for official misconduct, 1055.
 to provide court-room, 144.
 proof of service of summons, how made by, 415.
 liability of, for escape of party arrested, 501.
 liability, for selling on execution without notice, 693.
 liability, extent of, on a resale on execution, 697.
 to keep party arrested on justices' process till discharged, 865.
 to notify plaintiff of arrest, 864.
 to detain person arrested for contempt, till discharged, 1214.
 liability of, for arrest of witness, 2068, 2069.
- Ships and vessels**—see BOATS.
- Signature**—when deemed admitted in Justices' Courts, 887.
 to pleadings, 446.
 on written instrument, genuineness when deemed admitted,
 447, 448.
 when not deemed admitted, 449.
- Singular**—words in, include the plural, 17.
- Slander**—see LIBEL AND SLANDER.
- Sole traders**—who may become, 1811.
 notice, how given, 1812.
 petition, what to contain, 1813.
 community property allowed, 1814.
 who may oppose petition, and how, 1815.
 trial and hearing on application, 1816.
 decree, what to be, 1817.
 oath, form of, 1818.
 order, copy of, to be recorded, 1818.
 rights and liabilities of, 1819.
 must maintain children, 1820.
 husband not liable for debts of, 1821.
- Special administrators**—when appointed, 1411.
 special letters may be issued in vacation, 1412.

- Special administrators—Continued.**
 preference, to whom given, 1413.
 to take oath and give bonds, 1414.
 duties of, 1415.
 when powers of, to cease, 1416.
 to render account, 1417.
 See EXECUTORS AND ADMINISTRATORS.
- Special proceedings—defined, 23.**
 jurisdiction in Supreme Court, 52.
 jurisdiction in Superior Courts, 76.
 new trial, and appeal, 1110.
 costs allowed in, 1022.
 who is plaintiff in, 1063.
 who is defendant in, 1063.
 motion in, and orders, 1064.
 judgment in, 1064.
 practice in, 1109.
 for removal or suspension of attorney, 289.
 for condemnation of land, 1243.
 for condemnation, new proceedings, 1250.
 relative to escheated estates, 1269-1272.
 to recover escheated estate, 1272.
 in contest of elections, formality of, 1117.
 in Justices' Courts, provisions applicable, 925.
 on change of venue in Justices' Courts, 922.
 against public administrator for failure to pay over money, 1740.
- State—defined, 17.**
 costs in action, how paid by, 1038.
 not required to give bonds in action, 1058.
- Statement—of cause of action, how made, 427.**
 on motion for a new trial, how made, 661.
 effect of, 661.
 of points in judge's charge to be furnished, 608.
 on appeal to Superior Court, 975.
 when not necessary, 976.
 of findings, how made, 661.
- State officer—serving in official capacity, need not give bonds, 1058.**
- Statute—how construed, 1858.**
 existing, how construed, 5.
 definition of, 1898.
 intention of Legislature, to control, 1859.
 which of two constructions to prevail, 1866.
 public and private, defined, 1898.
 recitals in, as evidence, 1903.
 private, how pleaded, 459.
 inconsistent with Code, repealed, 18.
 See EVIDENCE, PUBLIC WRITINGS.
- Statute of Frauds—see EVIDENCE.**
- Statute of Limitations—how pleaded, 458.**
- Statutory prohibition—effect of, on limitations of actions, 356.**
- Stay of proceedings—on appeal from money judgment, 942.**
 on appeal in claim and delivery, 943.
 on judgment directing conveyance, 944.
 in real actions, 945.
 on appeal, effect of, 946.
 on judgment, for perishable property, 949.
 on filing undertaking on appeal, 979.
 pending review, 1071.
 See APPEAL.

Street—see HIGHWAYS.

Submission—to arbitration, 1281-1290.
controversy without action, 1138-1140.

Subpoena—for witnesses, defined, 1985.
may be issued by justice of the peace, 919, 920.
how issued, 1986.
how served, 1987.
how served on concealed witness, 1988.
when witness compelled to attend, 1989.
person present compelled to testify, 1990.
punishment for disobedience, 1991.
forfeiture therefor, 1992.
warrant may issue for witness, when, 1993.
warrant, contents of, 1994.
if witness is a prisoner, how brought by, 1995.
who may move for warrant, 1996.
imprisoned witness, how examined, 1997.
to witness to appear before commissioner, 2036.
See EVIDENCE.

Subscribing witness—defined, 1935.
to be called to prove instrument, 1940.
proceedings on his denial of knowledge, 1941.
See EVIDENCE, WILLS.

Subscription—includes mark, 17.

Substantial justice—to govern construction of pleading, 452, 475.

Substitution of parties—on death or disability, 385.
of party defendant, 386.

Successive actions—when may be prosecuted, 1047.

Successors—what justices successors of others, 98.
what justices of peace are, 107.
of justice, who deemed, 917.
in case of dispute, who to designate, 918.

Summary proceedings—to discharge from arrest, 1144.
to obtain possession of real property, 1161.

Summons—to be in English language, 185.

Manner of commencing civil actions.

how commenced, 405.
within what time may issue, 406.
issuance of, how made, 406.
how issued, directed, and what to contain, 407.
alias summons, when may issue, 408.
how served and returned, 410.
how served against particular persons, 411.
publication of, when may be made, 412.
service by publication in partition, 757.
by publication in action on liens, 1191.
manner of publication and appointment of attorney, 413.
service of, by telegraph, 1017.
proceedings, where a part only of several defendants are served,
414.
proof of service of summons, what constitutes, 415.
when jurisdiction acquired, 416.
on owners, etc., of vessels, 816.
provisions of Code as to, not applicable to contempts, 1016.
when to issue in Police Courts, 930.
service not personal, effect of, 473.

In Justices' Courts.

to whom directed, and what to contain, 844.
must issue within one year, 840.

Summons—Continued.*In Justices' Courts.*

- time for appearance before justice, 845.
- alias, when may issue, 846, 847.
- service of, in Justices' Court, where made, 848.
- by whom served in Justices' Courts, 849.
- hour given for appearance, 850.
- issuance of, how waived, 841.

In particular actions and proceedings.

- issuance of, to juror, in general, 225-238.
- to whom directed in partition, 756.
- service on partition, 757.
- in actions against steamers and vessels, 816.
- in forcible entry and detainer, what to state, 1168.
- service of, in forcible entry and detainer, 1167.
- in proceedings relating to escheated estates, 1269.
- in condemnation of land, what to contain, 1245.
- in condemnation of land, how issued and served, 1245.
- to interpreter, how served, 1884.

In proceedings against joint debtors.

- when to issue, after judgment, 969.
- what to contain in proceedings against joint debtor, 990.
- by what accompanied, 991.
- See JUROR.

Submission of controversy—how submitted, 1138.

- judgment thereon, 1139.
- judgment may be enforced or appealed from, 1140.

Superior Court—judges and elections, 65.

- of two or more judges, 66.
- of city and county of San Francisco, 67.
- terms of judges, 68.
- computation of years of office, 69.
- vacancies, 70.
- held by judges of other counties, 71.
- judges *pro tempore* of, 72.
- sessions of, 73.
- adjournments, 74.
- jurisdiction of two kinds, 75.
- original jurisdiction, 76.
- appellate jurisdiction, 77.
- process, 78.
- transfer of books, papers, and actions, 79.
- powers of previous courts conferred on, 79.
- to have seal, 147.
- held at request of governor, 160.
- jurors for, 204.
- reporters for, 269.
- appeals from, 939.
- appeals to, 963.
- powers on appeal, 960.
- jurisdiction in forcible entry and detainer, 1163.
- to appoint guardians, 1747.

Superior judge—elections of, 65.

- term of office of, 68.
- vacancies, 70.
- judge *pro tempore*, 72.
- powers conferred on, 79.
- qualifications of, 157.
- residence of, 158.

Supervisors—to select list of jurors for Superior Courts, 204.

- how to select, 205.

- Supplemental pleadings**—filing and service of, 464.
must be filed and served, 465.
- Supplementary proceedings**—debtor required to answer, 714.
proceedings to compel appearance, 715.
debtor may be arrested, 715.
debtor of debtor may pay creditor, 716.
debtor of debtor may be examined, 717.
witnesses required to testify, 718.
property of person owing debtor, how applied, 719.
proceedings on claim of third person, 720.
disobedience of parties, how punished, 721.
provisions to apply to Justices' Courts, 905.
- Supreme clerk**—duty of, on judgment or order on appeal, 958.
- Supreme Court**—elections and term of office, 40.
computation of years of office, 41.
vacancies, 42.
departments, 43.
apportionment of business, 44.
in bank, 45.
absence or disability of chief justice, 46.
sessions of, 47.
adjournments, 48.
decisions in writing, 49.
jurisdiction of two kinds, 50.
original jurisdiction, 51.
appellate jurisdiction, 52.
powers in appealed cases, 53.
concurrence necessary to transact business, 54.
transfer of books, papers, and actions, 55.
transfer of records and business to new court, 79.
remittitur in transferred cases, 56.
to have seal, 147.
officers appointed by, 265.
secretaries and bailiffs of, 265.
to hold office at pleasure of, 266.
- Supreme Court justices**—elections and terms of, 40.
qualifications of, 156.
ineligibility of, 161.
powers of, at chambers, 165.
disqualifications, 170.
not to practice law, 171.
nor have partner practicing, 172.
powers out of court, 176.
- Sureties**—action by, to compel satisfaction of debt, 1050.
liability, *inter sese*, effect of notice of action, 1055.
to justify on undertakings, 1057.
subrogation on payment of judgment, 709, 1059.
bound by estoppel, 1912.
- Surprise**—a ground for motion for new trial, 657.
relief from, by amendment, 473.
- Survey**—who may survey land taken for public use, 1242.
- Teamster**—property of, exempt from execution, 690.
- Telegraph**—service of papers may be made by, 1017.
- Tenant**—when guilty of unlawful detainer, 1161.
- Tender**—before suit, bars costs, 1030.
an offer equivalent to payment, 2074.
whoever pays, entitled to receipt, 2075.
objections to tender must be specified, 2076.

- Tenure**—of office preserved, 6.
how effected by repeal of an act, 7.
- Terms of court**—failure of, not to affect proceedings, 184.
of Supreme Court, 47.
sessions of Superior Courts, 73.
of Justices' Courts, 88.
- Term of office**—of supreme justices, 40.
of superior judges, 68.
of justices of the peace, 110.
- Testify**—definition of, 17.
- Testimony**—of witness, one kind of evidence, 1827.
when to be taken down by clerk, 1051.
of witness, modes of taking, 2002.
affidavit, defined, 2003.
deposition, defined, 2004.
oral examination, defined, 2005.
depositions, forms of, 2006.
of witness in State, how taken, 2021.
of witness out of State, how, 2024.
of witness out of United States, 2024.
application for order to perpetuate, 2084.
in actions for partition, 774.
in proceedings to contest probate, 1308.
in probate proceedings, to be taken down in writing, 1316.
- Proceedings to perpetuate.*
evidence may be perpetuated, 2083.
manner of application for order, 2084.
notice of time and place to be given, 2085.
manner of taking deposition, 2086.
deposition to be filed, 2087.
when the evidence may be produced, 2083.
effect of the deposition, 2089.
may be taken in case of adjournment, 596.
- Thing in action**—assignment of, 368.
- Timber**—cutting, treble damages, 733.
- Time**—of performance of act may be extended, 1054.
when Code takes effect, 2.
when takes effect in eminent domain, 1259.
exception as to service of notice of appeal, 1054.
enlargement of, to answer or demur in discretion of court, 473.
courts will take judicial notice of measurement of, 1875.
to amend, when begins to run, 476.
how computed, 12.
- Title**—of Code, 1.
head notes, when used in construing, 19.
- Tools**—what exempt from execution, 690.
- Town**—summons, how served on, 411.
- Town site**—in partition cases, 763.
- Transcript**—of judgment, effect of filing, 674.
of proceedings in probate, evidence of executor's authority, 1429.
- Transfer**—of interest not to abate action, 385.
of cause, on disqualification of judge, 398.
of cause, papers to be transmitted, 399.
proceedings after judgment, in certain cases transferred, 400.
of motions and orders to show cause, 1006.
- Of administrations.*
when judge not to act, 1430.

Undertakings—Continued.

action upon, on dismissal of action, 581.
 action upon, on a contempt, 1230.
 action upon, in attachment, 552.
 action upon, on release of attachment, 555.
 deposit instead of, in Justices' Court, 928.
 on appeal, 978.
 stay of proceedings on filing, 979.
 not required from State or officer, 1058.

Of plaintiff.

on arrest and bail, 482, 862.
 of defendant on arrest, 492.
 on arrest for contempt, to be returned, 1216.
 of plaintiff upon injunction, 529.
 on attachment, 539, 867.
 for release of attachment, 554, 868.
 of judgment debtor on supplementary proceedings, 715.
 of receiver, 567.
 for attachment of steamer, boat, or vessel, 818.
 for release of attachment against boats or vessels, 819.
 for continuance in Justices' Courts, 577.
 on proceedings for condemnation of land, 1254.
 on appeal, when to be filed, 941, 949.
 on appeal to County Court, 978.
 justification of sureties, 978.
 for costs of action, required of non-resident, 1036, 1037.
 justification of sureties on, 1057, 1809.
 not required from State, when a party, 1053.
 See BOND.

Unintelligibility—a ground for demurrer, 430.

United States—term defined, 17.

Unmarried female—may sue for her own seduction, 374.

Usurpation of office or franchise—writs of *scire facias* abolished, 802.

action may be brought, against whom, 803.
 name of person entitled to office may be set forth in complaint, 804.
 when party usurping may be arrested, 804.
 judgment, what rights it may determine, 805.
 when rendered in favor of applicant, 806.
 damages may be recovered, 807.
 rights of several persons may be determined in one action, 808.
 if defendant is guilty, judgment to be rendered, 809.
 security by relator, 810.

Vacancy—in office, not to affect proceedings, 184.

in office of Supreme Court justice, 42.
 in office of judge of Superior Court, 69.
 in office of justice of peace, 111.

Vacation—see CHAMBERS.

Variance—material, how provided for, 469.

immaterial, how provided for, 470.
 what not deemed a variance, 471.
 amendments of course, and effect of demurrer, 472.
 amendments by the court, 473.
 when party may be sued by fictitious name, 474.
 no error or defect to be regarded, unless it affects a substantial right, 475.
 time to amend, when begins to run, 476.

Venire—see JURORS, JURY.

Venue—see PLACE OF TRIAL.

Verdict—by three-fourths of jury, 613.
 when prevented, cause may be again tried, 616.
 sealed verdict may be directed by court to be brought in, 617.
 how declared, form of, 618.
 jury may be polled, 618.
 when informal, proceedings thereon, 619.
 general and special, defined, 624.
 when a general or special, may be rendered, 625.
 in actions for recovery of money, or establishing a counter-claim, 628.
 in actions for recovery of specific personal property, 627.
 entry of, 628.
 in actions for forcible entry and detainer, 1174.
 in actions to quiet title, 740.
 in proceedings against joint debtors, 994.
 in proceedings to contest probate, 1314.
 findings of referee, a special verdict, 643.
 causes for vacation of, 657.
 exceptions to, what must specify, 648.
 is part of judgment roll, 670.
 when may be reviewed on appeal, 956.

Verification—answer, when to be verified, 446.
 pleadings, how verified, 446.
 may be, by affidavit, 2009.
 genuineness and execution of instrument in complaint, when admitted, 447.
 genuineness and execution of written instrument in answer admitted, unless denied under oath, 448.
 when genuineness and execution of instrument are not admitted, 449.
 complaint for an injunction must be verified, 527.
 accusation against attorney must be verified, 291.
 complaint against steamboat or vessel must be verified, 815.
 application for voluntary dissolution must be verified, 1229.

Vessels—claims against, how sued, 816.
 See BOATS.

View—by jury, 610.

Wages—what exempt from execution, and when, 690.
 of mariner, a preferred claim under attachment, 825.

Waiver—of summons, 406.
 by failure to demur or answer, 434.
 of jury trial, 631.

War—a cause for removal of court, 142.
 effect of, on Statute of Limitations, 354.

Ward—see GUARDIAN AND WARD.

Warrant—to commit witness for examination, 1994.
 See CONTEMPT, ARREST AND BAIL.

Waste—several causes may be united, 427.
 actions for, against guardians, tenants, etc., 732.
 may be restrained during time for redemption, 706.
 what constitutes, 706.
 injurious acts of executors and administrators may be restrained, when, 1341.
 may be restrained during foreclosure, etc., 746.
 after execution, 745.

- Wills**—includes codicil, 17.
 revocation of, 1970.
- Jurisdiction.*
 in Superior Courts, 76.
 when exercised over estate, 1294.
 where the estate is in more than one county, 1295.
 custodian of will, to whom to deliver it, 1298.
 penalty for non-delivery of will, 1298.
- Petition, notice, and proof of.*
 who may petition for probate of, 1299.
 contents of petition, 1300.
 when executor forfeits right to letters, 1301.
 order for production of, to whom directed, 1302.
 penalty for disobedience of order, 1302.
 notice of petition for probate, how given, 1303.
 who to be notified, and how, 1304.
 petition may be presented at chambers, 1305.
 hearing proof of will, after proof of service of notice, 1306.
 who may appear and contest will, 1307.
 testimony required to prove will, 1308.
 probate of will, when there is no contest, 1308.
 olographic wills, 1309.
- Contesting probate of wills.*
 contestant to file grounds, and petitioner to reply, 1312.
 jury, how obtained, and trial, how had, 1313.
 verdict of jury, judgment, 1314.
 witnesses, who and how many may be examined, 1315.
 proof of handwriting, when admitted, 1315.
 testimony reduced to writing, for further evidence, 1316.
 if proved, certificate to be attached, 1317.
 will and proof to be filed and recorded, 1318.
- Probate of foreign will.*
 wills proved in other State, when and where to be recorded, 1322.
 proceedings on the production of foreign will, 1323.
 hearing proof of probate of foreign will, 1324.
- Contesting will after probate.*
 probate may be contested within one year, 1327.
 citation to be issued to parties interested, 1328.
 hearing on proof of service, 1329.
 petitions for revoke of probate, how tried, 1330.
 what judgment to be rendered, 1330.
 on revocation of, power of executor, etc., ceases, 1331.
 costs and expenses, by whom paid, 1332.
 probate, when conclusive, 1333.
 one year after removal of disability, given to infants and others,
 1333.
- Probate of lost or destroyed wills.*
 proof of lost or destroyed will to be taken, 1338.
 must have been in existence at the time of death, 1339.
 to be recorded and letters granted, 1340.
 court to restrain injuries during, 1341.
- Probate of nuncupative wills.*
 when and how admitted to probate, 1344.
 additional requirements in probate of, 1345.
 contest and appointment to conform to provisions as to other
 wills, 1346.
- Witnesses**—defined, 1878.
 all persons capable of perception and communication may be,
 1879.
 persons who cannot testify, 1880.
 persons in certain relations to parties, prohibited, 1831.
 when privileged persons must testify, 1882.
 judge or juror may be a witness, 1883.

Witnesses—Continued.

when an interpreter, to be sworn, 1884.
 may be compelled to attend, 123, 1989, 2064.
 testimony of witness in State, when taken, 2021.
 testimony of witness out of State, 2024.
 how to procure witness upon commission, 2036.
 how, if no commission, 2037.
 attendance, how enforced in contesting elections, 1120.
 protected from arrest when attending, etc., 2067.
 court to discharge from arrest, 2070.
 manner of application for order, 2084.

Means of production of.

subpoena for witness, defined, 1965.
 subpoena, how issued, 1966.
 to be issued in contested election cases, 1120.
 how served, 1987.
 may be served by telegraph, 1020.
 how served on concealed witness, 1988.
 when witness is compelled to attend, 1989.
 person present compelled to testify, 1990.
 disobedience, how punished, 1991.
 forfeiture for disobedience, 1992.
 when warrant may issue to bring witness, 1993.
 contents of warrant, to produce, 1994.
 if a prisoner, how brought, 1995.
 on whose motion, 1996.
 imprisoned witness, how examined, 1997.

Rights and duties of witnesses.

witness bound to attend when subpoenaed, 2064.
 bound to answer questions, 2065.
 right of, to protection of court, 2066.
 protected from arrest when attending, 2067.
 arrest so made, void, liability for, 2068.
 affidavit to be made by witness arrested, 2069.
 to be discharged from arrest, 2070.
 how to be sworn, 1846.
 rights, as to form of swearing, 2095.
 may either take oath or affirmation, 2097.

Testimony of.

who may be examined in supplementary proceedings, 718.
 may be examined on trial of challenge, 603.
 evidence of, what required, 1969.
 testimony of, in State, 2021.
 testimony of, out of State, 2024.
 how to procure upon commission, 2024.
 how, if no commission, 2037.
 discharged from arrest, 2070.
 perpetuation of testimony of, 2084.
 how many required to prove contested will, 1308.
 how many for uncontested will, 1315.
 to what can testify, 1845.
 presumptions, concerning, 1847.

See EXAMINATION OF WITNESSES.

Words—used in singular, convertible with plural, 17.

in masculine, convertible with feminine, 17.
 to be construed by context, 16.
 giving joint authority, how construed, 15.

Work—not to be done on holidays, 13.**Writ—defined, 17.**

jurisdiction for issuance of, 51, 76.
 may be issued at chambers, 165, 166.
 to bear seal of court, 153.

Writ—Continued.

certain, declared valid without seal, 158.
 what writ abolished, 802.
 of review, mandate and prohibition, 1108.
 may be served by telegraph, 1017.

Writings—are one kind of evidence, 1827.

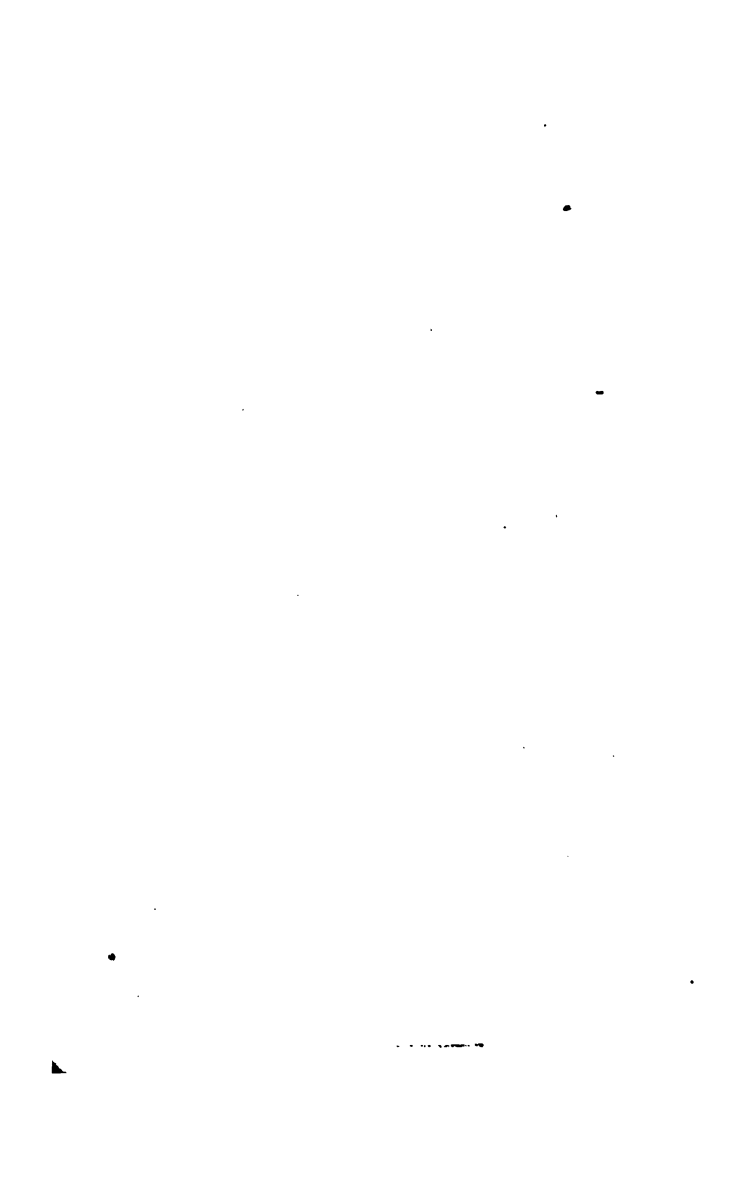
original writings are original evidence, 1829.
 copies of, are secondary evidence, 1830.
 contents of, how proved, 1835.
 agreement, when deemed the whole, 1856.
 construction of language relates to place where used, 1857.
 general rule of construction, 1858.
 intention of parties to be pursued, 1859.
 circumstances to be considered, 1860.
 terms, construed by general acceptance, 1861, 1865.
 written words control those printed in blank form, 1862.
 skilled persons may testify to decipher characters, 1863.
 of two constructions, which preferred, 1864.
 of two interpretations, which preferred, 1866.
 are of two kinds, public and private, 1887.
 public, defined, 1888.
 private, defined, 1889.
 inspection of, may be demanded, 1000.
 shown to witness, may be inspected by adverse party, 2054.
 who may inspect and copy public writings, 1892.
 duty of custodian of, 1893.
 copy of, how certified, 1923.
 when altered, who to explain, 1982.

See EVIDENCE, PRIVATE WRITINGS, PUBLIC WRITINGS.

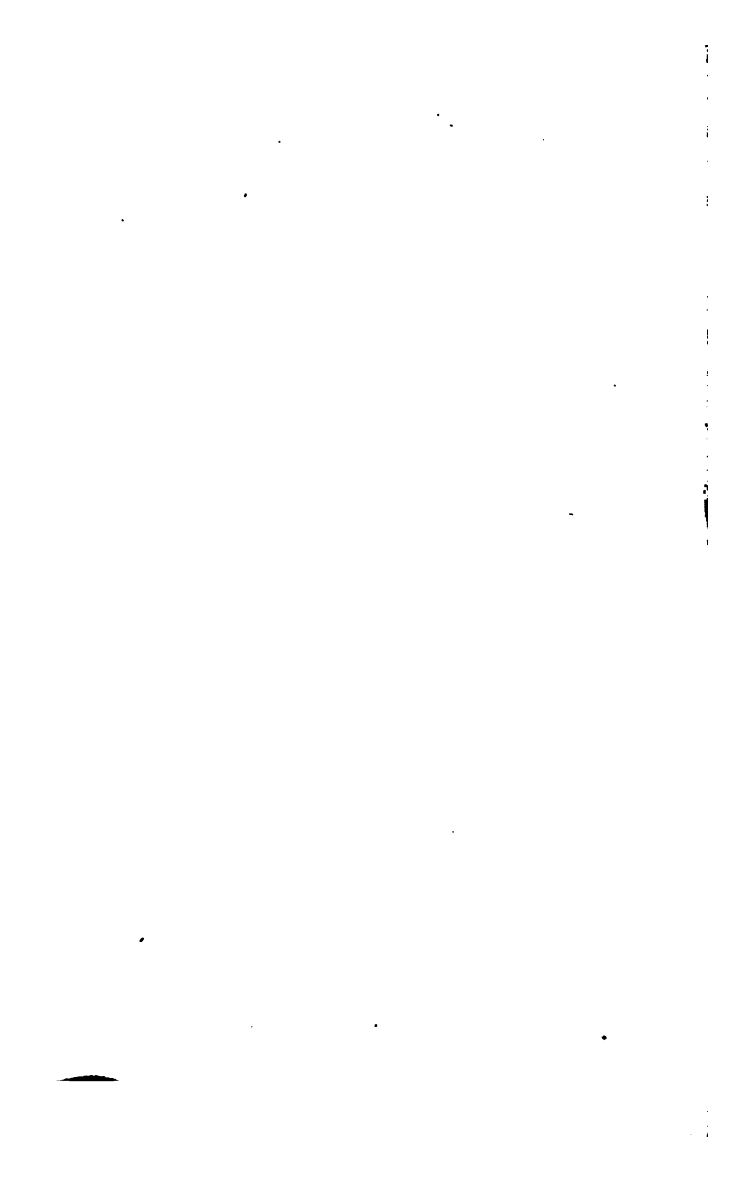
Written instrument—in complaint, how controverted, 447.

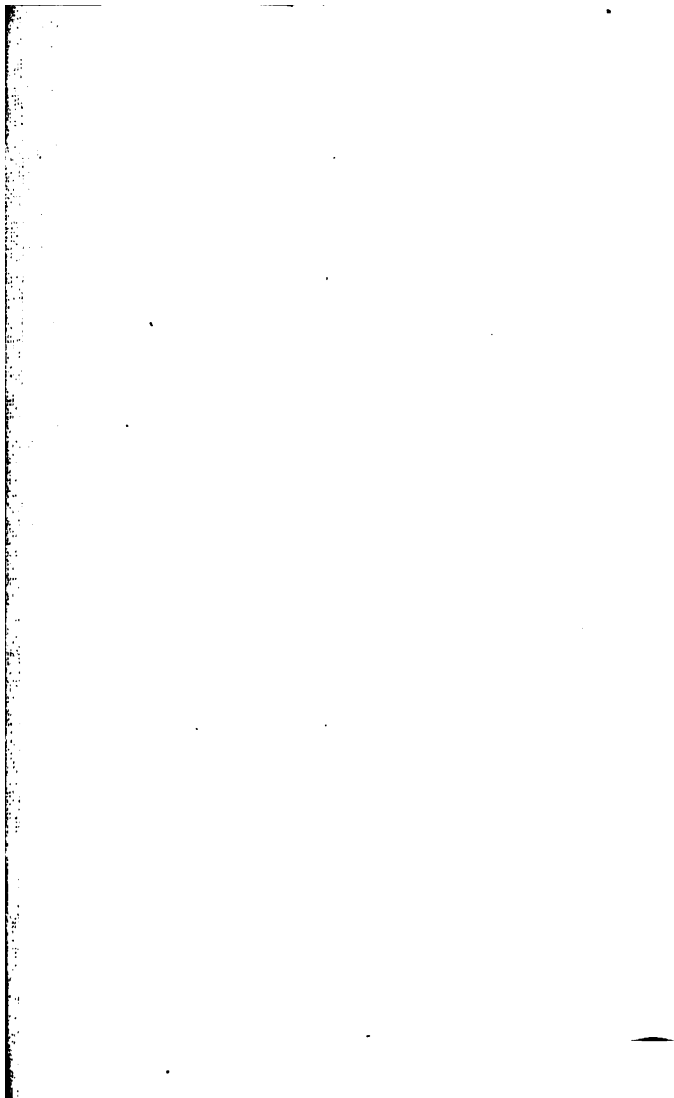
in answer, how controverted, 448.
 inspection of, may be demanded, 1000.
 inspection refused, effect of refusal, 449.
 inspection of writing shown to witness, 2054.

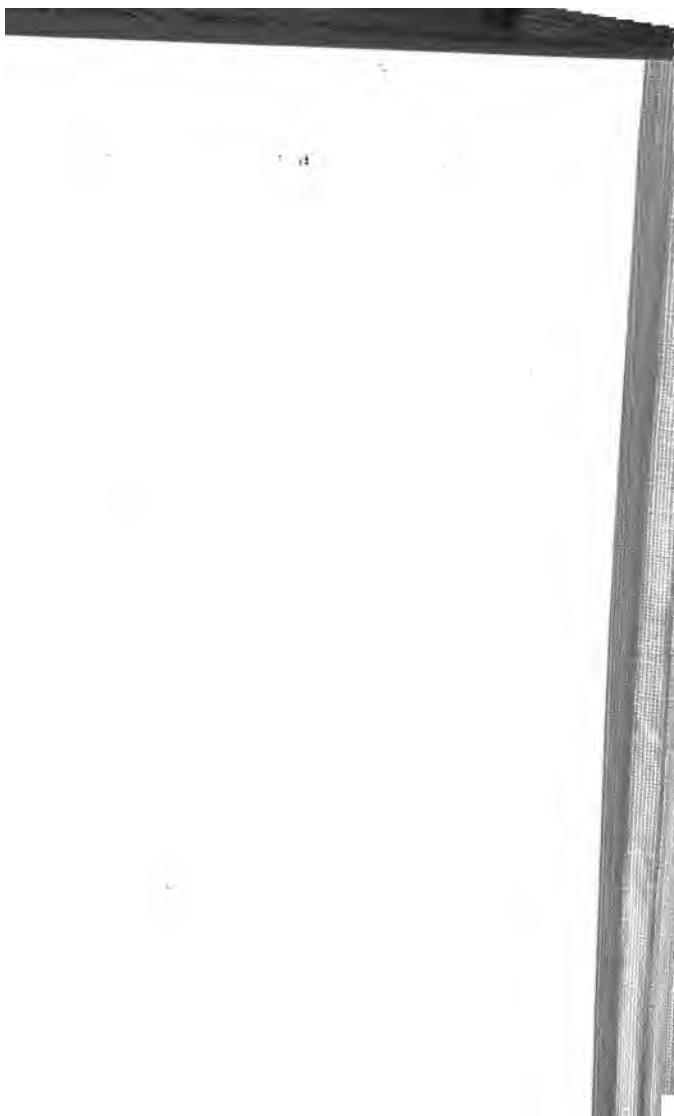
See WRITINGS.











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